Nor Badli Munawir bin Mohamad Alias Lafti v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–281–11 OF 2021
VAZEER ALAM, AHMAD ZAIDI IBRAHIM AND AZMI ARIFFIN JJCA
18 JANUARY 2024

B

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged with five counts of criminal breach of trust under s 409 of Penal Code and five counts of money laundering under s 4(1)(a) of Anti-Money Laundering and Anti-Terrorism Financing Act 2001 — Appellant convicted and sentenced to imprisonment — Whether learned judges failed to judicially appreciate defence case — Whether learned judges failed to appreciate alibi of appellant — Whether defence ought to be accepted when it was never challenged by prosecution — Whether witnesses were accomplices whose evidence was uncorroborated — Whether there was failure to appreciate and consider difference between property in cheque and property in money in bank account — Whether evidence of PW20 ought to be refused

C

D

E

The appellant ('accused') was the chief executive officer ('CEO') of TH Heavy Engineering Bhd ('THHE') and charged with the duties of managing and overseeing the affairs of the company and those of its active subsidiary companies which included THHE Fabricators Sdn Bhd ('THHE Fabricators'), OnG Works Sdn Bhd and THHE Offshore. Bicara Sepakat Sdn Bhd ('Bicara Sepakat') was one of the contractors for the PERMAS development project ('PERMAS project') awarded by Murphy Sarawak Oil Co Ltd ('Murphy') to THHE Fabricators. For this project, THHE appointed Bicara Sepakat as its sub-contractor. Coral Intoil Sdn Bhd ('Coral Intoil') was one of the contractors for THHE Fabricators for the Shell D12-Laila project. RL Offshore Sdn Bhd ('RL Offshore') as one of the contractors for THHE Fabricators was awarded a project by THHE Fabricators. It was one of the packages in the PERMAS project. In April 2013, the accused told his general manager of finance ('PW20') to prepare a cheque for RM400,000 that need to be urgently paid to Bicara Sepakat. PW20 then directed the senior finance manager ('PW18') and senior executive ('PW4') from the finance department to prepare the payment voucher and cheque. A director of Bicara Sepakat ('PW6') and CEO of Bicara Sepakat ('PW8') confirmed that she was asked to generate a sham invoice for the payment received. After RM400,000 was credited, PW6 withdrew the money from the company account and handed the cash to the accused. In June 2013, the accused had again asked PW20 to prepare another payment of RM1m divided into two separate cheques, one in the sum of RM570,000 payable to Bicara Sepakat and another in the sum of

F

G

H

I

RM430,000 be made payable to Coral Intoil. PW8 said he received a telephone call from the accused to inform him that RM570,000 had been credited into Bicara Sepakat's bank account. The accused told PW8 to withdraw the said amount and hand over the cash to him. After RM570,000 had been credited, PW6 and PW8 withdrew the money and handed over the cash directly to the accused. PW8 and PW6 confirmed that a sham invoice was prepared for the payment received by Bicara Sepakat. The executive director of Coral Intoil ('PW13') testified that the accused had asked his favour to withdraw cash of RM430,000 to be given directly to him as he needed the money to pay the Murphy guys. PW13 was reluctant at first to do something which was not right, but finally agreed to the accused's request solely because PW13 was more concerned about the continued business ties/joint venture that Coral Intoil had with THHE Fabricators. After having found that the money had been credited, PW13 went to the bank to cash the cheque. On the same day, PW13 met the accused at his office and handed over a bag containing the cash of RM430,000 directly to the accused. Sometime in September 2013, the accused instructed PW20 to prepare a cheque for RM600,000 made payable to Bicara Sepakat to complete the RM2m allegedly to be given to some people at Murphy. After verifying the remittance, PW8 and PW6 withdrew the money and gave the RM600,000 cash to the accused. In October 2023, the accused told PW20 that he required a final payment of RM575,800 to be paid to the Murphy guys. PW20 was quite reluctant to accede to the accused's request because the full payment of RM2m supposed to have been paid to the Murphy guys had already been paid. PW20 said that the accused informed him that the actual amount to be paid to the Murphy guys was 1.5% of the PERMAS contract sum which amounted to RM2,575,833. The accused then directed PW20 to prepare the said payment and that it be made payable to RL Offshore. PW18 and PW4 confirmed that the payment was made without any supporting claims document from RL Offshore. The CEO of RL Offshore ('PW11') testified that at a meeting with PW20 and the accused, the cheque for RM575,800 was given to PW11. The accused then asked PW11's favour to encash the cheque and the cash sum of RM570,000 be given to him while the balance RM5,800 was to be kept by PW11. PW11 said he was constrained to agree with the demands made by the accused because RL Offshore was tied-up to the PERMAS project and did not want to jeopardise it. RL Offshore made a claim of RM1m to THHE Fabricators for the first milestone payment under the PERMAS project for work done. Since THHE Fabricators had already paid the sum of RM575,800 to RL Offshore, there was the balance sum of RM424,200 due in December 2013 instead of the RM1m claimed. Hence, only RM424,200 was paid to RL Offshore. Dissatisfied, PW11 insisted the accused to pay for the full payment of the milestone claim of RM1m. Due to the insistence by PW11, the accused turned to PW8 of Bicara Sepakat and asked PW8 to cover the amount of RM575,800 to RL Offshore. Again, PW8 had no choice but to oblige. The accused was tried in the sessions court with five counts of criminal breach of trust ('CBT No 1–5 charges') under s 409 of

the Penal Code and five counts of money laundering under s 4(1)(a) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA No 1–5 charges'). At the close of the prosecution case, the learned sessions court judge ordered the acquittal and discharged of the accused in respect of AMLATFA No 1 charge and ordered him to enter upon his defence on the remaining nine charges. At the end of the trial, the learned trial judge held that there was no doubt as to his guilt and accordingly he was convicted of all the remaining nine charges and sentenced. For each of the CBT offence, the accused was sentenced to imprisonment for the period of seven years and it was ordered to run concurrently. For each offence of money laundering, the accused was sentenced to four years of imprisonment and the sentences were ordered to run concurrently but to be served only after the completion of the sentence for the CBT charges. The accused appealed to the High Court against both the conviction and sentence. The learned High Court judge affirmed the findings of the trial judge and dismissed the appeal of the accused against conviction. However, the learned High Court judge allowed the appeal against sentence and ordered as follows: (a) the sentence for each of the CBT charges was set aside and substituted with a sentence of five years of imprisonment. The sentences were ordered to run concurrently; (b) the sentence for each of the AMLATFA charges was set aside and substituted with a sentence of three years of imprisonment. The sentences were also ordered to be run concurrently; and (c) sentences for CBT charges and AMLATFA charges were ordered to run consecutively. Hence, this appeal.

Held:

(1) Regarding CBT No 5 and AMLATFA No 5 charges, it was clear from the evidence of the chief operating officer of THHE that the payment of RM575,800 made to RL Offshore was pursuant to a valid and legitimate agreement with RL Offshore for work done under that contract. Therefore, the appeal in respect of these two charges was allowed and the conviction and sentences were set aside (see para 154).

(2) As for CBT No 3 and AMLATFA No 3 charges, the evidence given by the executive secretary to the accused ('DW3') and the executive director of Pricewaterhouse Coopers Malaysia ('DW5') and the entry in visitor logbook supported the accused's defence of alibi and that there was a failure by the trial judge to judicially appreciate this crucial evidence. Even though it was not disputed that the accused was at his office at the material time but the critical issue here was whether PW13 was present at the accused's office at 3.30pm and delivered the money to the accused as stated in the charge. The finding of the trial judge went against the grain of evidence. It would be unsafe to sustain the conviction handed down by the learned session court judge and the High Court judge in respect of both these charges and thus appellate intervention was therefore warranted. Hence, the appeal in respect of these two charges was allowed

and the conviction and sentence handed down by the learned High Court judge was set aside (see para 161).

(3) Failure of the prosecution to cross-examine the accused on a crucial part per se did not amount to an admission or acceptance of the accused's testimony. It was also apparent from the learned trial judge's comprehensive judgment that she had directed herself on the issue of credibility of the prosecution witnesses and accepted their evidence. The learned trial judge had not erred and her findings were fully supported by the abundance by both oral and documentary evidence heaped against the accused. It left no leeway for appellate interference in the circumstances of this case. There was no substantial miscarriage of justice to have occurred to the accused person by failure of the prosecution to challenge or put the essence of their case to the accused or his witnesses. Such failure did not go to the credibility of the prosecution witnesses nor did it amount to an acceptance of the defence witnesses' evidence. The accused knew well what the case was against him when the prosecution closed its case and had been afforded all the opportunity to present his defence (see paras 175, 181 & 184).

(4) For the CBT charges, there were no reasons to interfere with the findings made by the learned trial judge as well as the learned high court judge when they had safely concluded that the defence raised by the accused was wholly untenable and that the accused had failed to rebut the presumption of having acted dishonestly on the balance of probabilities. The defence of the accused that the payments made to Corail Intoil and Bicara Sepakat were in fact advance payments for the project they were having with the company were mere bare denials and not true. It was merely an excuse to cover up his unlawful activity. Additionally, it was also wrong for the accused to make payments when payments were not due to the contractors. What more when PW8 and PW13 had confirmed that the payments were not related to the work done and they did not make the claim to THHE (see paras 186–188).

(5) There were ample evidence of corroboration of the testimony of witnesses. There was in fact abundance of independent and compelling evidence confirming the evidence of PW6, PW8, PW11, PW13 and PW20 in material particulars. The withdrawal of the monies from the company's respective bank accounts etc were all corroborated via oral and documentary evidence. In the end the cash eventually ended up with the accused (see paras 189 & 195).

(6) To suggest that a distinction must be drawn between a property in cheque and property in cash was entirely fallacious. The cheques issued had money value and was indeed a property within the meaning of s 405 of the Penal Code. The cheque passed the property of THHE namely the money value stated on the cheque to the payee. The accused's conduct or

act was actuated by dishonest intention to subsequently misappropriate THHE's money/funds for his own use through the use of these cheques. The manner in which the money was demanded and received lend credence to the prosecution case that the accused had acted dishonestly, thus causing wrongful gain to himself and wrongful loss to THHE. Hence, there was no infirmity in the conviction on the remaining CBT charges. These convictions were safe (see paras 201–203 & 205).

(7) PW20's evidence was supported by cogent independent evidence connecting the accused with the charges. Hence, it was reasonably safe for the learned trial judge to act upon PW20 evidence (see para 206).

(8) The learned trial judge had not misdirected herself in law. She had considered the evidence of both the prosecution and for the defence very carefully and had given her reasons why she accepted or did not accept certain evidence and had correctly come to the conclusion that she did. Undoubtedly, the same goes to the judgment delivered by the learned High Court judge where he had taken a detailed evaluation of the entire evidence, critically analysed witnesses evidence placed before the court with great care and at great length and made his findings. There were no infirmities in the decision of the learned High Court judge. The conviction against the accused by the High Court for CBT Nos 1, 2 and 4 and the AMLATFA 2 and 4 charges were safe and the appeal was dismissed and the conviction and sentence of the High Court was affirmed (see paras 214–215).

[Bahasa Malaysia summary

Perayu ('tertuduh') ialah ketua pegawai eksekutif ('CEO') TH Heavy Engineering Bhd ('THHE') dan dipertanggungjawabkan dengan tugas mengurus dan menyelia hal ehwal syarikat dan syarikat subsidiarinya yang aktif termasuk THHE Fabricators Sdn Bhd ('THHE Fabricators'), OnG Works Sdn Bhd dan THHE Offshore. Bicara Sepakat Sdn Bhd ('Bicara Sepakat') merupakan salah seorang kontraktor bagi projek pembangunan PERMAS ('projek PERMAS') yang dianugerahkan oleh Murphy Sarawak Oil Co Ltd ('Murphy') kepada THHE Fabricators. Untuk projek ini, THHE melantik Bicara Sepakat sebagai sub-kontraktornya. Coral Intoil Sdn Bhd ('Coral Intoil') merupakan salah seorang kontraktor THHE Fabricators untuk projek Shell D12-Laila. RL Offshore Sdn Bhd ('RL Offshore') sebagai salah satu kontraktor untuk THHE Fabricators telah dianugerahkan projek oleh THHE Fabricators. Ia adalah salah satu pakej dalam projek PERMAS. Pada April 2013, tertuduh memberitahu pengurus besar kewangannya ('PW20') untuk menyediakan cek berjumlah RM400,000 yang perlu dibayar segera kepada Bicara Sepakat. PW20 kemudian mengarahkan pengurus kanan kewangan ('PW18') dan eksekutif kanan ('PW4') daripada jabatan kewangan untuk menyediakan baucar pembayaran dan cek. Pengarah Bicara Sepakat ('PW6') dan CEO Bicara Sepakat ('PW8') mengesahkan beliau diminta menjana invois

palsu untuk pembayaran yang diterima. Selepas RM400,000 dikreditkan, PW6 mengeluarkan wang daripada akaun syarikat dan menyerahkan wang tunai kepada tertuduh. Pada Jun 2013, tertuduh sekali lagi meminta PW20 menyediakan satu lagi bayaran RM1 juta yang dibahagikan kepada dua cek berasingan, satu berjumlah RM570,000 yang perlu dibayar kepada Bicara Sepakat dan satu lagi berjumlah RM430,000 perlu dibayar kepada Coral Intoil. PW8 berkata beliau menerima panggilan telefon daripada tertuduh memaklumkan bahawa RM570,000 telah dikreditkan ke dalam akaun bank Bicara Sepakat. Tertuduh memberitahu PW8 untuk mengeluarkan jumlah tersebut dan menyerahkan wang tunai kepadanya. Selepas RM570,000 dikreditkan, PW6 dan PW8 mengeluarkan wang dan menyerahkan wang tunai terus kepada tertuduh. PW8 dan PW6 mengesahkan invois palsu disediakan untuk pembayaran yang diterima oleh Bicara Sepakat. Pengarah eksekutif Coral Intoil ('PW13') memberi keterangan bahawa tertuduh telah meminta bantuannya untuk mengeluarkan wang tunai RM430,000 untuk diberikan terus kepadanya kerana dia memerlukan wang untuk membayar orang Murphy. PW13 pada mulanya keberatan untuk melakukan sesuatu yang tidak betul, tetapi akhirnya bersetuju dengan permintaan tertuduh semata-mata kerana PW13 lebih mengambil berat tentang hubungan perniagaan/usahasama yang berterusan yang Coral Intoil dengan THHE Fabricators. Selepas mendapati wang itu telah dikreditkan, PW13 pergi ke bank untuk menunaikan cek. Pada hari yang sama, PW13 bertemu tertuduh di pejabatnya dan menyerahkan beg berisi wang tunai RM430,000 terus kepada tertuduh. Pada September 2013, tertuduh mengarahkan PW20 menyediakan cek berjumlah RM600,000 yang perlu dibayar kepada Bicara Sepakat untuk melengkapkan RM2 juta yang dikatakan akan diberikan kepada beberapa orang di Murphy. Selepas mengesahkan kiriman wang, PW8 dan PW6 mengeluarkan wang dan memberikan wang tunai RM600,000 kepada tertuduh. Pada Oktober 2023, tertuduh memberitahu PW20 bahawa dia memerlukan bayaran akhir sebanyak RM575,800 untuk dibayar kepada orang Murphy itu. PW20 agak keberatan untuk memenuhi permintaan tertuduh kerana bayaran penuh RM2 juta yang sepatutnya dibayar kepada orang Murphy telah pun dibayar. PW20 berkata, tertuduh memaklumkan kepadanya bahawa jumlah sebenar yang perlu dibayar kepada orang Murphy itu ialah 1.5% daripada jumlah kontrak PERMAS yang berjumlah RM2,575,833. Tertuduh kemudian mengarahkan PW20 menyediakan bayaran tersebut dan perlu dibayar kepada RL Offshore. PW18 dan PW4 mengesahkan bahawa pembayaran dibuat tanpa sebarang dokumen tuntutan sokongan daripada RL Offshore. CEO RL Offshore ('PW11') memberi keterangan bahawa pada pertemuan dengan PW20 dan tertuduh, cek berjumlah RM575,800 telah diberikan kepada PW11. Tertuduh kemudian meminta bantuan PW11 untuk menunaikan cek dan wang tunai RM570,000 diberikan kepadanya manakala baki RM5,800 disimpan oleh PW11. PW11 berkata beliau terpaksa bersetuju dengan tuntutan tertuduh kerana RL Offshore terikat dengan projek PERMAS dan tidak mahu menjejaskannya. RL

Offshore membuat tuntutan RM1 juta kepada THHE Fabricators untuk bayaran perkembangan pertama di bawah projek PERMAS untuk kerja yang telah dilakukan. Memandangkan THHE Fabricators telah membayar jumlah RM575,800 kepada RL Offshore, terdapat jumlah baki RM424,200 yang perlu dibayar pada Disember 2013 dan bukannya RM1 juta yang dituntut. Oleh itu, hanya RM424,200 telah dibayar kepada RL Offshore. Tidak berpuas hati, PW11 menegaskan tertuduh membayar bayaran penuh tuntutan penting sebanyak RM1 juta. Atas desakan PW11, tertuduh beralih kepada PW8 Bicara Sepakat dan meminta PW8 menampung jumlah RM575,800 kepada RL Offshore. Sekali lagi, PW8 tidak mempunyai pilihan selain memenuhinya. Tertuduh dibicarakan di mahkamah sesyen dengan lima pertuduhan pecah amanah jenayah ('pertuduhan CBT No 1–5') di bawah s 409 Kanun Keseksaan dan lima pertuduhan pengubahan wang haram di bawah s 4(1)(a) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('pertuduhan AMLATFA No 1–5'). Pada penutupan kes pendakwaan, hakim mahkamah sesyen yang bijaksana memerintahkan pembebasan dan pembebasan tertuduh berkenaan dengan pertuduhan AMLATFA No 1 dan memerintahkan dia membela diri atas sembilan pertuduhan yang selebihnya. Pada akhir perbicaraan, hakim bicara yang bijaksana memutuskan bahawa tidak ada keraguan tentang kesalahannya dan oleh itu dia telah disabitkan dengan semua baki sembilan pertuduhan dan dijatuhkan hukuman. Bagi setiap kesalahan CBT, tertuduh dijatuhi hukuman penjara selama tempoh tujuh tahun dan ia diperintahkan berjalan serentak. Bagi setiap kesalahan pengubahan wang haram, tertuduh dijatuhi hukuman penjara empat tahun dan hukuman itu diperintahkan berjalan serentak tetapi hanya dijalani selepas selesai hukuman bagi pertuduhan CBT. Tertuduh merayu ke Mahkamah Tinggi terhadap sabitan dan hukuman. Hakim Mahkamah Tinggi yang bijaksana mengesahkan penemuan hakim bicara dan menolak rayuan tertuduh terhadap sabitan. Walau bagaimanapun, hakim Mahkamah Tinggi yang bijaksana membenarkan rayuan terhadap hukuman dan memerintahkan seperti berikut: (a) hukuman bagi setiap pertuduhan CBT telah diketepikan dan digantikan dengan hukuman penjara lima tahun. Hukuman telah diarahkan berjalan serentak; (b) hukuman bagi setiap pertuduhan AMLATFA telah diketepikan dan digantikan dengan hukuman penjara tiga tahun. Hukuman itu juga diperintahkan untuk dijalankan serentak; dan (c) hukuman bagi pertuduhan CBT dan pertuduhan AMLATFA diperintahkan berjalan berasingan. Oleh itu, rayuan ini.

Diputuskan:

(1) Berkenaan pertuduhan CBT No 5 dan AMLATFA No 5, adalah jelas daripada keterangan ketua pegawai operasi THHE bahawa pembayaran RM575,800 yang dibuat kepada RL Offshore adalah menurut perjanjian yang sah dan sahih dengan RL Offshore untuk kerja dilakukan di bawah kontrak itu. Oleh itu, rayuan berkenaan dengan dua pertuduhan ini

dibenarkan dan sabitan dan hukuman diketepikan (lihat perenggan 154).

(2) Bagi pertuduhan CBT No 3 dan AMLATFA No 3, keterangan yang diberikan oleh setiausaha eksekutif kepada tertuduh ('DW3') dan pengarah eksekutif Pricewaterhouse Coopers Malaysia ('DW5') dan catatan dalam buku log pelawat menyokong pembelaan alibi tertuduh dan bahawa terdapat kegagalan oleh hakim bicara untuk menghargai keterangan penting ini secara kehakiman. Walaupun tidak dipertikaikan bahawa tertuduh berada di pejabatnya pada masa material tetapi isu kritikal di sini ialah sama ada PW13 hadir di pejabat tertuduh pada jam 3.30 petang dan menyerahkan wang kepada tertuduh seperti yang dinyatakan dalam pertuduhan. Penemuan hakim bicara bertentangan dengan butiran keterangan. Adalah tidak selamat untuk mengekalkan sabitan yang dijatuhkan oleh hakim mahkamah sesyen yang bijaksana dan hakim Mahkamah Tinggi berkenaan dengan kedua-dua pertuduhan ini dan oleh itu campur tangan rayuan adalah wajar. Oleh itu, rayuan berhubung kedua-dua pertuduhan ini dibenarkan dan sabitan serta hukuman yang dijatuhkan oleh hakim Mahkamah Tinggi yang bijaksana telah diketepikan (lihat perenggan 161).

(3) Kegagalan pihak pendakwaan untuk menyoal balas tertuduh pada bahagian yang penting semata-mata tidak bermaksud dengan pengakuan atau penerimaan keterangan tertuduh. Ia juga jelas daripada penghakiman komprehensif hakim bicara yang bijaksana bahawa dia telah mengarahkan dirinya sendiri mengenai isu kredibiliti saksi pendakwaan dan menerima keterangan mereka. Hakim bicara yang bijaksana tidak terkhilaf dan penemuannya disokong sepenuhnya oleh jumlah besar kedua-dua keterangan lisan dan dokumen yang ditimbunkan terhadap tertuduh. Ia tidak memberi peluang untuk campur tangan rayuan dalam keadaan kes ini. Tidak ada kecuaian keadilan yang ketara berlaku kepada tertuduh kerana kegagalan pihak pendakwaan untuk mencabar atau meletakkan intipati kes mereka kepada tertuduh atau saksinya. Kegagalan tersebut tidak menjejaskan kredibiliti saksi pendakwaan dan tidak juga bermakna penerimaan keterangan saksi pembelaan. Tertuduh mengetahui apa kes terhadapnya apabila pihak pendakwaan menutup kesnya dan telah diberi semua peluang untuk mengemukakan pembelaannya (lihat perenggan 175, 181 & 184).

(4) Bagi pertuduhan CBT, tidak ada sebab untuk mengganggu penemuan yang dibuat oleh hakim bicara yang bijaksana serta hakim mahkamah tinggi yang bijaksana apabila mereka telah membuat kesimpulan dengan selamat bahawa pembelaan yang dibangkitkan oleh tertuduh adalah tidak boleh dipertahankan sepenuhnya dan bahawa tertuduh telah gagal untuk menyangkal anggapan telah bertindak secara tidak jujur

berdasarkan imbangan kebarangkalian. Pembelaan tertuduh bahawa bayaran yang dibuat kepada Corail Intoil dan Bicara Sepakat sebenarnya adalah bayaran pendahuluan bagi projek yang mereka lakukan dengan syarikat itu adalah penafian semata-mata dan tidak benar. Ia hanyalah alasan untuk menutup aktiviti haramnya. Selain itu, tertuduh juga adalah salah untuk membuat pembayaran apabila bayaran tidak perlu dibayar kepada kontraktor. Apatah lagi apabila PW8 dan PW13 telah mengesahkan bahawa bayaran tersebut tidak berkaitan dengan kerja yang dilakukan dan mereka tidak membuat tuntutan kepada THHE (lihat perenggan 186–188).

(5) Terdapat banyak keterangan yang menyokong keterangan saksi. Hakikatnya terdapat banyak keterangan bebas dan meyakinkan yang mengesahkan keterangan PW6, PW8, PW11, PW13 dan PW20 dalam butiran material. Pengeluaran wang daripada akaun bank syarikat masing-masing dan sebagainya semuanya disokong melalui keterangan lisan dan dokumen. Akhirnya wang tunai itu akhirnya berakhir dengan tertuduh (lihat perenggan 189 & 195).

(6) Untuk mencadangkan bahawa perbezaan mesti dibuat antara harta dalam cek dan harta tunai adalah salah sepenuhnya. Cek yang dikeluarkan mempunyai nilai wang dan sememangnya harta dalam pengertian s 405 Kanun Keseksaan. Cek itu meluluskan harta THHE iaitu nilai wang yang dinyatakan pada cek kepada penerima. Kelakuan atau perbuatan tertuduh telah digerakkan oleh niat tidak jujur untuk kemudiannya menyalahgunakan wang/dana THHE untuk kegunaannya sendiri melalui penggunaan cek ini. Cara bagaimana wang itu dituntut dan diterima memberi kebenaran kepada kes pendakwaan bahawa tertuduh telah bertindak secara tidak jujur, sehingga menyebabkan keuntungan yang salah kepada dirinya dan kerugian yang salah kepada THHE. Oleh itu, tiada kelemahan dalam sabitan ke atas pertuduhan CBT yang selebihnya. Sabitan-sabitan adalah selamat (lihat perenggan 201–203 & 205).

(7) Keterangan PW20 disokong oleh keterangan bebas yang kukuh yang menghubungkan tertuduh dengan pertuduhan. Oleh itu, adalah selamat bagi hakim bicara yang bijaksana untuk bertindak atas keterangan PW20 (lihat perenggan 206).

(8) Hakim bicara yang bijaksana tidak salah mengarahkan dirinya dalam undang-undang. Beliau telah mempertimbangkan keterangan kedua-dua pihak pendakwaan dan pihak pembelaan dengan sangat berhati-hati dan telah memberikan alasan mengapa beliau menerima atau tidak menerima keterangan tertentu dan telah membuat kesimpulan dengan betul bahawa beliau telah menerimanya. Tidak dinafikan, perkara yang sama berlaku kepada penghakiman yang disampaikan oleh hakim Mahkamah Tinggi yang bijaksana di mana

beliau telah mengambil penilaian terperinci ke atas keseluruhan keterangan, menganalisis secara kritis keterangan saksi yang diletakkan di hadapan mahkamah dengan teliti dan panjang lebar serta membuat penemuannya. Tiada kelemahan dalam keputusan hakim Mahkamah Tinggi yang bijaksana. Sabitan terhadap tertuduh oleh Mahkamah Tinggi bagi pertuduhan CBT No 1, 2 dan 4 dan AMLATFA 2 dan 4 adalah selamat dan rayuan telah ditolak dan sabitan serta hukuman Mahkamah Tinggi telah disahkan (lihat perenggan 214–215).]

Cases referred to

Amri bin Ibrahim & Anor v PP and another appeal [2017] 1 MLJ 1; [2017] 1 CLJ 617, FC (refd)

Awtar Singh s/o Mangar Singh v PP [2000] 3 SLR 439, HC (refd)

Chan Chi Kong v The Queen [2002] HKCU 941 (refd)

Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)

Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737, FC (refd)

Davies v Director of Public Prosecutions [1954] AC 378, HL (refd)

Farose bin Tamure Mohamad Khan v PP and other appeals [2016] 6 MLJ 277; [2016] 9 CLJ 769, FC (refd)

Harcharan Singh & Anor v PP [2005] 1 MLJ 593; [2005] 1 CLJ 11, CA (refd)

Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)

Kurchang Singh Wedhawa Singh v PP [1989] 2 CLJ 442, HC (refd)

LCY v TWY [2019] 4 MLJ 203; [2019] 7 CLJ 158, CA (refd)

Liza bte Ismail v PP [1997] 2 SLR 454, HC (refd)

Lorensus Tukan v PP [1988] 1 MLJ 251, SC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Ong Teng For v PP [2013] 1 CLJ 39, FC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 2 MLRA 590, FC (refd)

PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)

PP v Radhakrishnam Syam & Ors and another case [2023] MLJU 1324, HC (refd)

Pie Bin Chin v PP [1985] 1 MLJ 234 (refd)

P'ng Hun Sun v Dato' Yip Yee Foo [2013] 6 MLJ 523; [2013] 2 AMCR 350, CA (refd)

Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37; [2005] 1 CLJ 466, CA (refd)

Sathiadas v PP [1970] 2 MLJ 241; [1970] 1 LNS 142; [1970] 1 MLRH 166 (refd)

UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys

Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)
Wan Marzuki bin Wan Abdullah v PP [2008] MLJU 285; [2008] 1 MLRA 479, CA (refd)
Wong Swee Chin v PP [1981] 1 MLJ 21, FC (refd)
Yahaya bin Mohamad v Chin Tuan Nam [1975] 2 MLJ 117; [1975] 1 LNS 195, PC (refd)
Ye Wei Gen v PP [1999] 4 SLR 101, HC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 4, 4(1)(a)
Criminal Procedure Code s 402A
Evidence Act 1950 s 133
Penal Code ss 23, 24, 384, 405, 409, 409B

Appeal from: *Nor Badli Munawir bin Mohamad Alias Lafti v Public Prosecutor* [2022] MLJU 1339 (High Court, Kuala Lumpur)

K Kumaraendran (with Hisyam Teh Poh Teik, Kitson Foong, Cheetan Jethwani, Kee Wei Lan, Low Wei Loke, Yaw Xinying, Ivy Shu, Chew Jee San and Vam Sher Mooi) (Kit & Assoc) for the appellant.
Nahra bt Dollah (with Parvin Hameedah Natchiar and Aida Khairuleen bt Azli) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azmi Ariffin JCA:

INTRODUCTION

[1] The appellant was tried in the Sessions Court at Kuala Lumpur with five counts of criminal breach of trust ('CBT') under s 409 of the Penal Code and five counts of money laundering under s 4(1)(a) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the AMLATFA').

THE CHARGES

[2] Particulars of the first three CBT charges (Case No WA-WA-62R-1–01 of 2017) were as follows:

> First Charge ('CBT 1'):
>
> Bahawa kamu di dalam bulan April 2013, di Pejabat THHE Fabricators Sdn Bhd, Tingkat 23, Tower B, Menara UOA Bangsar, No 5, Jalan Bangsar Utama 1, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai Ketua Pegawai Eksekutif Syarikat TH Heavy Engineering Bhd dan di dalam kapasiti tersebut, diamanahkan dengan suatu harta iaitu sekeping cek Maybank bertarikh 30/4/2013 bernombor 681488 berjumlah RM400,000.00 telah melakukan pecah amanah jenayah dan

adalah dengan ini melakukan satu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

Second Charge ('CBT 2'):

Bahawa kamu di dalam bulan Jun 2013, di Pejabat THHE Fabricators Sdn Bhd, Tingkat 23, Tower B, Menara UOA Bangsar, No 5, Jalan Bangsar Utama 1, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai Ketua Pegawai Eksekutif syarikat TH Heavy Engineering Bhd dan di dalam kapasiti tersebut, diamanahkan dengan suatu harta iaitu sekeping cek Maybank bertarikh 26/6/2013 bernombor 753749 berjumlah RM570,000.00 telah melakukan pecah amanah jenayah dan adalah dengan ini melakukan satu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

Third Charge ('CBT 3'):

Bahawa kamu di dalam bulan Jun 2013, di Pejabat THHE Fabricators Sdn Bhd, Tingkat 23, Tower B, Menara UOA Bangsar, No 5, Jalan Bangsar Utama 1, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai Ketua Pegawai Eksekutif syarikat TH Heavy Engineering Bhd dan di dalam kapasiti tersebut, diamanahkan dengan suatu harta iaitu sekeping cek Maybank bertarikh 26/6/2013 bernombor 753760 berjumlah RM430,000.00 telah melakukan pecah amanah jenayah dan adalah dengan ini melakukan satu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

[3] Particulars of the last two CBT charges (Case No WA-WA-62R-2–01 of 2017) were as follows:

First Charge ('CBT 4'):

Bahawa kamu di dalam bulan September 2013, di Pejabat THHE Fabricators Sdn Bhd, Tingkat 23, Tower B, Menara UOA Bangsar, No 5, Jalan Bangsar Utama 1, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai Ketua Pegawai Eksekutif syarikat TH Heavy Engineering Bhd dan di dalam kapasiti tersebut, diamanahkan dengan suatu harta iaitu sekeping cek Maybank bertarikh 9/9/2013 bernombor 802984 berjumlah RM600,000.00 telah melakukan pecah amanah jenayah dan adalah dengan ini melakukan satu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

Second Charge ('CBT 5'):

Bahawa kamu di dalam bulan Oktober 2013, di Pejabat THHE Fabricators Sdn Bhd, Tingkat 23, Tower B, Menara UOA Bangsar, No 5, Jalan Bangsar Utama 1, di dalam Wilayah Persekutuan. Kuala Lumpur, sebagai Ketua Pegawai Eksekutif syarikat TH Heavy Engineering Bhd dan di dalam kapasiti tersebut, diamanahkan dengan suatu harta iaitu sekeping cek Maybank bertarikh 30/10/2013 bernombor 834262 berjumlah RM575,800.00 telah melakukan pecah amanah jenayah dan adalah dengan ini melakukan satu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

[4] Particulars of the first three AMLATFA charges (Case No WA-62R-7–03 of 2017) were as follows:

First Charge ('AMLATFA 1'):

Bahawa kamu pada 2 Mei 2013 antara jam 6.00 petang dan 8.00 malam di Old Town White Coffee Ara Damansara, Oasis Square, No 2, Jalan PJU 1A/7A, Petaling Jaya, dalam daerah Petaling, dalam Selangor, telah melibatkan diri dalam penggubahan wang haram, dengan menerima wang tunai berjumlah RM400,000.00 daripada Murhasmee bin Mukhtar, Pengarah Syarikat Bicara Sepakat Sdn Bhd yang merupakan hasil daripada suatu aktiviti haram dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 (Akta 613).

Second Charge ('AMLATFA 2'):

Bahawa kamu pada 26 Jun 2013 antara jam 6.00 petang dan 8.00 malam di Old Town White Coffee Ara Damansara, Oasis Square, No 2, Jalan PJU 1A/7A, Petaling Jaya, dalam daerah Petaling, dalam Selangor, telah melibatkan diri dalam penggubahan wang haram, dengan menerima wang tunai berjumlah RM570,000.00 daripada Murhasmee bin Mukhtar, Pengarah Syarikat Bicara Sepakat Sdn Bhd yang merupakan hasil daripada suatu aktiviti haram dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 (Akta 613).

Third Charge ('AMLATFA 3'):

Bahawa kamu pada 27 Jun 2013 antara jam 2.00 dan 4.00 petang di THHE Fabricators Sdn Bhd, B-23-1, Tower 8, Menara UOA Bangsar, No 5, Jalan Bangsar Utama 1, 59200 Kuala Lumpur, dalam daerah Kuala Lumpur, dalam Kuala Lumpur, telah melibatkan diri dalarn penggubahan wang haram, dengan menerima wang tunai berjumlah RM430,000.00 daripada Mohd Razip bin Mohammad, Pengarah Syarikat Coral Intoil Sdn Bhd yang merupakan hasil daripada suatu aktiviti haram dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 (Akta 613).

[5] Particulars of the last two AMLATFA charges (Case No WA-62R-8–03 of 2017) were as follows:

First Charge ('AMLATFA 4'):

Bahawa kamu pada 11 September 2013 antara jam 6.00 petang dan 8.00 malam di Old Town White Coffee Ara Damansara, Oasis Square, No 2, Jalan PJU 1A/7A, Petaling Jaya, dalam daerah Petaling, dalam Selangor, telah melibatkan diri dalam penggubahan wang haram, dengan menerirna wang tunai berjumlah RM600,000.00 daripada Murhasmee bin Mukhtar, Pengarah Syarikat Bicara Sepakat Sdn Bhd yang merupakan hasil daripada suatu aktiviti haram dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 (Akta 613).

Second Charge ('AMLATFA 5'):

Bahawa kamu pada 1 November 2013 antara jam 3.00 dan 4.00 petang di Restoran Leaf Dining, No 5-1, Jalan Solaris 1, Solaris Mont Kiara, 50480 Kuala Lumpur, dalam daerah Kuala Lumpur, dalam Kuala Lumpur, telah melibatkan diri dalam penggubahan wang haram, dengan menerima wang tunai berjumlah RM570,000.00 daripada Hanaffi bin Daud, Pengarah Syarikat RL Offshore Sdn Bhd yang merupakan hasil daripada suatu aktivitl haram dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 (Akta 613).

[6] The appellant pleaded not guilty and claimed trial to all the charges. At the close of the prosecution case, the learned sessions court judge ordered the acquittal and discharged of the appellant in respect of the first charge (Case No WA-62R-7–03 of 2017) under the AMLATFA and ordered him to enter upon his defence on the remaining nine charges. There was no appeal filed by the public prosecutor against the said acquittal.

[7] At the end of the trial, the learned trial judge held that there was no doubt as to his guilt and accordingly he was convicted of all the remaining nine charges and sentenced.

[8] For each of the CBT offence, the appellant was sentenced to imprisonment for the period of seven years. This sentence of imprisonment was ordered to run concurrently.

[9] For each offence of money laundering, the appellant was sentenced to four years' imprisonment and the sentences were ordered to run concurrently but to be served only after the completion of the sentence for the CBT charges.

[10] Dissatisfied by the said decision, on 30 September 2019, the appellant appealed to the High Court Kuala Lumpur against both the conviction and sentence.

[11] On 2 November 2021, the learned High Court judge affirmed the findings of the trial judge and dismissed the appellant's appeal against conviction.

[12] However, the learned High Court judge allowed the appeal against sentence and ordered as follows:

(a) the sentence of seven years imprisonment for each of the CBT charges was set aside and substituted with a sentence of five years' imprisonment. The sentences were ordered to run concurrently;

(b) the sentence of four years imprisonment for each of the AMLATFA charges was set aside and substituted with a sentence of three years' imprisonment. The sentences were also ordered to be run concurrently; and

(c) sentences for CBT charges and AMLATFA charges were ordered to run consecutively.

[13] Aggrieved by the decision of the learned High Court judge, the appellant mounted this appeal against conviction and sentence.

[14] The appellant will be referred to as the accused in this judgment.

THE PROSECUTION'S CASE

[15] The facts of the case appear sufficiently and clearly in the grounds of judgment of the learned High Court judge. To appreciate the charges it is necessary to give a narrative of the chronological events as established by the prosecution which led to the prosecution of the accused.

[16] The accused was at all material times the Chief Executive Officer ('CEO') of TH Heavy Engineering Bhd ('THHE') and charged with the duties of managing and overseeing the affairs of the company and those of its active subsidiary companies which include THHE Fabricators Sdn Bhd ('THHE Fabricators'), OnG Works Sdn Bhd ('OnG') and THHE Offshore ('THHEOF'). THHE is a company involved in diversified engineering activities including but not limited to major offshore fabrication, hook-up and commissioning of oil and gas facilities, maintenance and servicing of plants and equipment.

[17] The charges against the accused on which he was convicted were connected with three companies, namely, Bicara Sepakat Sdn Bhd, Coral Intoil Sdn Bhd and RL Offshore Sdn Bhd.

[18] We propose to deal with the involvement of this three named companies in the order which we think they ought to be dealt with.

THE FIRST CBT CHARGE AND THE FIRST AMLATFA CHARGE

Bicara Sepakat Sdn Bhd

[19] Bicara Sepakat Sdn Bhd was one of the contractors for the PERMAS development project ('PERMAS project') awarded by Murphy Sarawak Oil Co

Ltd (Murphy') to THHE Fabricators on 1 April 2013. For this project, THHE appointed Bicara Sepakat Sdn Bhd as its sub-contractor.

[20] Sometime around the end of April 2013, the accused told his General Manager of Finance Salahuddiin bin Rushdi @ Marco (PW20) to prepare a cheque for RM400,000 that need to be urgently paid to Bicara Sepakat Sdn Bhd. PW20 then directed Senior Finance Manager (Kumaresan a/l Ramasamy (PW18) and PW4 (Intan Farhannaz bt Husin) Senior Executive from the Finance Department to prepare the payment voucher and cheque. On the payment voucher (exh P12) the nature of payment was written down as 'Advance Payment' as instructed by the accused.

[21] PW20 then directed PW18 and PW4 to prepare a cheque for payment to Bicara Sepakat Sdn Bhd. The cheque (exh P15) was signed by PW20 and counter-signed by the accused.

[22] PW20 then directed PW18 and PW4 to make immediate and direct payment to Bicara Sepakat Sdn Bhd's Maybank Islamic account, which was done via bank remittance form (exh P35). PW18 and PW4 prepared exh P35 and was approved by PW20 and the accused.

[23] PW18 and PW4 testified that exhs P12, P15 and P35 were prepared without any claim invoice or supporting documents from Bicara Sepakat Sdn Bhd because the accused wanted it to be done urgently.

[24] PW6 (Siti Zarwanie bt Zakaria) a director of Bicara Sepakat Sdn Bhd and PW8 confirmed that she was asked to generate a sham invoice (exh P20) for the payment received, on which it was written down on as 'BEING CONSULTATION AND INSPECTION FEES ON PIPING WORKS FOR SHELL'.

[25] After RM400,000 was credited into Bicara Sepakat Sdn Bhd account, on 2 May 2013, SP6 withdrew the RM400,000 from the company account. SP8 instructed her finance clerk SP5 (Nordahlia bt Ibrahim) to prepare a payment voucher (exh P44) and cheque (exh P46) on the pretexts as 'BAYARAN BALIK PINJAMAN' to director.

[26] After withdrawal of the monies at Maybank Kuala Terengganu, PW6 and PW8 (Murhasmee bin Mukthar) drove to Kuala Lumpur on the same day with the cash in hand to meet the accused. They met the accused at the Old Town White Coffee Cafe at Ara Damansara, Petaling Jaya and handed the cash to the accused.

THE SECOND CBT CHARGE AND THE SECOND AMLATFA CHARGE

[27] In June 2013, the accused had again asked PW20 to prepare another payment of RM1m divided into two separate cheques, one in the sum of RM570,000 payable to Bicara Sepakat Sdn Bhd and another in the sum of RM430,000 be made payable to Coral Intoil Sdn Bhd. The accused told PW20 to state it as payment for 'Consultancy — Murphy' in the payment vouchers. PW20 then instructed PW18 and PW4 to prepare two separate cheques.

[28] Cheque of RM570,000 (exh P27) and payment voucher (exh P13) was for payment to Bicara Sepakat Sdn Bhd. A temporary payment voucher (exh P9) and cheque of RM430,000 (exh P26) was for payment to Coral Intoil Sdn Bhd. Exhibit P27 and P26 were signed by PW20 and accused without any claims document received from both the company.

[29] After these cheques were prepared and signed, the accused later instructed PW20 to change the method of payment to bank remittance. PW18 and PW4 confirmed that they were asked to prepare a new cheque together with the bank remittance forms. The new cheques of RM570,000 (exh P16) were prepared to be paid to Bicara Sepakat Sdn Bhd and another new cheque of RM430,000 (exh P10) were made payable to Coral Intoil Sdn Bhd. These two replacements cheques were later signed by PW20 and counter-signed by another authorised officer, PW19 (John George Ritchie) because the accused was not in the office at that material time.

[30] On 26 June 2013, PW8 said he received a telephone call from the accused to inform him that RM570,000 has been credited into Bicara Sepakat Sdn Bhd's bank account. The accused told PW8 to withdraw the said amount and hand over the cash to him. PW8 directed PW6 to arrange the withdrawal of the monies from the company's bank account. A payment voucher (exh P45) and cheque of RM570,000 (exh P47) were prepared by PW5. The purpose of the payment in exh P45 were written as 'REPAYMENT OF LOAN'.

[31] PW6 went to Maybank Kuala Terengganu together with PW8 to withdraw the monies. On the same day, they went to Kuala Lumpur and met the accused at the Old Town White Cafe, Ara Damansara, Petaling Jaya and PW8 handed over the cash of RM570,000 directly to the accused.

[32] PW8 and PW6 confirmed that a sham invoice (exh P19) was prepared for the payment received by Bicara Sepakat Sdn Bhd where it was written in the invoice as 'BEING CONSULTATION AND INSPECTION FEES ON PIPING WORKS FOR SHELL'.

Coral Intoil Sdn Bhd

[33] Coral Intoil Sdn Bhd was one of the contractors for THHE Fabricators for the Shell D12-Laila project. The company was principally in the business of providing oil and gas advisory services in the areas of onshore fabrication, offshore hook-up and commissioning, retrofitting and transportation and installations as well as the trading of certain niche products.

[34] On 13 September 2012, THHE and Coral Intoil Sdn Bhd entered into a teaming agreement whereby both parties agreed to collaborate in the preparation and submission of tenders for works.

[35] The executive director of Coral Intoil Sdn Bhd Datuk Mohd Razip bin Mohammad (PW13) testified that the accused had asked his favour to withdraw cash of RM430,000 to be given directly to him as he needed the money to pay the Murphy guys. PW13 was reluctant at first to do something which was not right, but finally agreed to the accused's request solely because PW13 was more concerned about the continued business ties/joint venture that Coral Intoil Sdn Bhd had with THHE Fabricators.

[36] On 18 June 2013, PW13 instructed the company's Accounts Executive, Raja Ahmad Farhni bin Raja Sulaiman (PW12) to prepare a cheque of RM430,000 as preparation in case the company received the transfer fund of RM430,000 from THHE Fabricators. However, PW12 prepared a cheque (exh P80) of RM431,028 because the additional sum of RM1,028 was for PW13's own use.

[37] On 26 June 2013, PW13 received a cheque (exh P26) dated 25 June 2013 amounting to RM430,000 from THHE Fabricators. PW13 handed over the cheque to PW12 to be deposited into the company's bank account. PW12 prepared a false receipt (exh P88) and invoice (exh P18) for the money received from THHE Fabricators. On exh P18 it was stated as 'SUPPLY MANPOWER TO THHE AT YARD' whereas Coral Intoil Sdn Bhd had never supplied such services or work to THHE. However, the cheque (exh P26) received from THHE was dishonored. Upon inquiry, PW13 was informed that the bounced cheque (exh P26) had been replaced with a new cheque (exh P10) with the same amount and payment will be made by direct remittance/telegraphic transfer into the account of Coral Intoil Sdn Bhd.

[38] On 27 June 2013, after having found that the money had been credited, PW13 went to Ambank to cash the cheque (exh P80). That afternoon, on the same day, PW13 met the accused at his office located at Menara UOB Bangsar and handed over a bag containing the cash of RM430,000 directly to the accused. The accused thanked him and PW13 then left the accused's office.

THE FOURTH CBT CHARGE AND THE FOURTH AMLATFA CHARGE

[39] Sometime in September 2013, the accused instructed PW20 to prepare a cheque for RM600,000 made payable to Bicara Sepakat Sdn Bhd to complete the RM2m allegedly to be given to some people at Murphy who the accused termed as the 'Murphy guys'. PW20 then instructed PW18 and PW4 to prepare the payment voucher (exh P14) and the cheque (exh P17). The cheque was signed by PW20 and the accused. PW4 said that in the payment voucher it was stated that the purpose of the payment was for 'MAN POWER SUPPLY'. However, PW4 confirmed that she did not received any invoice from Bicara Sepakat Sdn Bhd for the same.

[40] The said cheque (exh P17) was then deposited into the bank account of Bicara Sepakat Sdn Bhd. The accused then informed PW8 that the money was already in the account of Bicara Sepakat Sdn Bhd. After verifying the remittance, on 11 September 2013 PW8 and PW6 went to Maybank Kuala Terengganu and withdrew cash of RM600,000 via cheque (exh P48). PW8 confirmed that Bicara Sepakat Sdn Bhd were forced to prepare a false invoice (exh P21) to justify receipt of the RM600,000 from THHE Fabricators for the alleged work done.

[41] PW6 gave the RM600,000 to PW8. Both of them later went to Kuala Lumpur and met the accused at Old Town White Coffee Cafe, Ara Damansara in Petaling Jaya. There, PW8 handed over the RM600,000 cash to the accused.

[42] On 30 October 2023, PW20 met the accused at his office. Accused told PW20 that he required a final payment of RM575,800 to be paid to the Murphy guys. PW20 was quite reluctant to accede to the accused's request because the full payment of RM2m supposed to have been paid to the Murphy guys had already been paid. PW20 said that the accused informed him that the actual amount to be paid to the Murphy guys was 1.5% of the PERMAS contract sum which amounted to RM2,575,833. The accused then directed PW20 to prepare the said payment and that it be made payable to RL Offshore Sdn Bhd.

[43] PW20 then instructed PW18 and PW4 to prepare the payment voucher (exh P5) and cheque (exh P7) for the amount of RM575,800. Both the payment voucher and the cheque were signed by PW20 and counter-signed by the accused. The item in the payment invoice were written as 'CONSULTATION FEE PERMAS'. PW18 and PW4 confirmed that the payment was made without any supporting claims document from RL Offshore Sdn Bhd.

RL Offshore Sdn Bhd

[44] RL Offshore Sdn Bhd was one of the contractors for THHE Fabricators. Sometime towards the end of July 2013, RL Offshore Sdn Bhd was awarded a project by THHE Fabricators. It was one of the packages in the PERMAS project. Payment for this project was based on milestone achievements. There were five milestones and for each milestone the payment was valued at RM1m.

[45] On 30 October 2013, the Chief Executive Officer of RL Offshore Sdn Bhd Dato' Hanaffi bin Daud (PW11) testified that he met PW20 and the accused at the PJ Hilton Hotel. At the meeting, the cheque (exh P7) for RM575,800 was given to PW11. The accused then asked PW11's favour to encash the cheque and the cash sum of RM570,000 be given to him while the balance RM5,800 was to be kept by PW11.

[46] On 31 October 2013, PW11 credited the RM575,800 cheque (exh P7) into the account of RL Offshore Sdn Bhd.

[47] On 1 November 2013, PW11 withdrew cash of RM570,000 through three cheques (exhs P81A, P81B and P81C) from the account of RL Offshore Sdn Bhd. After that, PW11 met the accused at around 3pm at Leaf Dining Restaurant at Mont Kiara and handed over the cash sum of RM570,000 to the accused. PW11 said he was constrained to agree with the demands made by the accused because RL Offshore Sdn Bhd was tied-up to the PERMAS project and did not want to jeapordise it.

[48] On 2 October 2013, RL Offshore Sdn Bhd made a claim of RM1m to THHE Fabricators for the first milestone payment under the PERMAS project for work done in respect of the 'PROVISION FOR THE SUPPLY OF CHEMICAL INJECTION PACKAGE FOR THE MURPHY'S SARAWAK SK13 PERMAS DEVELOPMENT PROJECT' through vide invoice No 039/13 (exh P6). The said invoice was process by THHE on 31 October 2013.

[49] Since THHE Fabricators had already paid the sum of RM575,800 to RL Offshore Sdn Bhd, there was the balance sum of RM424,200 due in December 2013 instead of the RM1m claimed. Hence, only this sum of RM424,200 was paid to RL Offshore Sdn Bhd.

[50] Dissatisfied with receiving only the amount of RM424,200, PW11 insisted the accused to pay for the full payment of the milestone claim of RM1m. Due to the insistence by PW11, the accused turned to PW8 of Bicara Sepakat Sdn Bhd and asked PW8 to cover the amount of RM575,800 to RL

Offshore Sdn Bhd. Again, PW8 had no choice but to oblige. A cheque (exh P49) for the said amount was later made out and encashed by PW6. Sometime in July 2014, PW6 gave the cash to PW8 to be given to PW11.

THE DEFENCE

[51] The accused elected to give evidence under oath.

[52] The accused further called eight witnesses to testify on his behalf.

THE ACCUSED'S VERSION

[53] He was at the material time the chief executive officer of THHE and one of the directors of THHE Fabricators. The accused version was essentially as follows.

CBT CHARGE

Bicara Sepakat Sdn Bhd

[54] The accused contended that there were problems caused by the migration of the management system from that of UBS System to ERP Microsoft Axapta, where the new system supplied limited descriptions for payments made to be made to contractors. To overcome this problem, the top management of THHE together with the Financial Division decided to use the general label of 'consultancy' to speed up the payment process for work done by the contractors.

[55] The system migration problem had affected THHE Fabricators' ability to make speedy payment to the contractors. With limited financial resources, the contractors were unable to complete their contract works within stipulated time. The delay in completing the project would have seriously affected THHE's reputation and would have exposed THHE Fabricators to very high liquidated ascertained damages.

[56] In order to speed up payment to the contractors, THHE management together with the Financial Division decided to give 'advance payment' to certain contractors.

[57] Bicara Sepakat Sdn Bhd was a small scale company where the financial position of the company is very limited and depended on work demand. Hence, THHE needed to made advance payment to Bicara Sepakat Sdn Bhd ahead of its normal schedule in order to finance the company's preparation cost

such as purchasing equipment and staff mobilisation so that the company be able to complete the contract works well within the timeline.

[58] In 2013, Bicara Sepakat Sdn Bhd was awarded a piping works contract worth RM6.985m in the Murphy Project by THHE Fabricators. At the same time, Bicara Sepakat Sdn Bhd was also involved in Shell D12 and Laila project where the delays in completion of the project were due to financial constraint faced by Bicara Sepakat Sdn Bhd. To avoid and overcome the project delays, the accused and PW20 had signed a company cheque of RM400,000 as advance payment to Bicara Sepakat Sdn Bhd.

[59] A cheque (exh P27) of RM570,000 was also made payable to Bicara Sepakat Sdn Bhd. The said cheque was signed by PW20 and PW19. The accused testified that for both the cheques, there were no invoices attached with the cheques because they were advances payment.

[60] Sometime in September 2013, the accused instructed PW20 to prepare a cheque (exh P17) dated 9 September 2013 for RM600,000 made payable to Bicara Sepakat Sdn Bhd. The cheque was signed by PW20 and the accused. The accused said that this was meant as advance payment to Bicara Sepakat Sdn Bhd.

[61] The accused said that the chief executive officer of Bicara Sepakat Sdn Bhd, Murhasmee bin Mukthar (PW8) was aware of the advance payment arrangement made. This can be seen from the complaint PW8 make via email send to the accused for THHE's management to speed up Bicara Sepakat Sdn Bhd's payment claims (see PW8 emails dated 26 November 2012, 9 January 2013, 1 February 2013, 14 February 2013, 21 March 2013 and 16 April 2013).

Coral Intoil Sdn Bhd

[62] There was a Teaming Agreement (exh P43) dated 13 September 2012 between Coral Intoil Sdn Bhd and THHE.

[63] THHE issued a Maybank cheque (exh P10) of RM430,000 dated 26 June 2013 to Coral Intoil Sdn Bhd. The accused said that he had no knowledge of the purpose for the issuance of the cheque because it was not signed by him. PW20 and PW19 signed the cheque.

[64] The accused only signed a THHE's Maybank cheque (exh P26) of RM430,000 made payable to Coral Intoil Sdn Bhd as advance payment for claim made by Coral Intoil Sdn Bhd.

[65] The accused testified that he had no knowledge of the payment voucher (exh P9) which stated 'Cash Advance — Payment for consultancy — Murphy') because his signature does not appear in the voucher.

RL Offshore Sdn Bhd

[66] The company was one of THHE's contractors under the PERMAS Project, and was awarded a supply work contract known as 'Chemical Injection Package' worth RM5m.

[67] The company issued invoice (exh P6) dated 1 October 2013 to THHE for milestone claim No 1 ('Provision for the supply of chemical injection package for Murphy's Sarawak SK311 PERMAS Development Project') amounting to RM1m.

[68] However, due to THHE's financial difficulties, arrangement was made for the claim of RM1m be settled by way of two payments ie a first payment of RM575,800 and followed by RM424,200.

[69] On 1 November 2013, the accused together with PW20 met PW11 at the PJ Hilton Hotel to explain the financial difficulties faced by THHE at that point in time. At the same time, PW11 was given the RM575,800 cheque (exh P7) dated 30 October 2013 by PW20 as part payment for the claim made by RL Offshore Sdn Bhd.

[70] Subsequently, THHE paid the balance sum of RM424,200 via Maybank cheque (exh P30) dated 6 January 2014 to RL Offshore Sdn Bhd.

AMLATFA CHARGES

[71] All payments made to the contractors were valid and done in accordance with the law.

[72] The accused denied receiving monies directly for himself or from PW8, PW11 and/or PW13.

[73] The accused denied having demanded monies from PW8, PW11 and PW13.

[74] No internal investigation was conducted by the Board of Directors against him and/or by the whistle blower committee of THHE and THHE Fabricators against him.

[75] There were no proceeds of illegal activities derived from any criminal breach of trust on all the five investigations against him. Hence, the accused and his family's properties were returned without forfeiture.

Alibi (third AMLATFA charge)

[76] On 27 September 2013, at about 3pm, the accused attended an official meeting at the THHE meeting room with Mr Ramon A. Chelva, an executive director of Pricewaterhouse Coopers Advisory Services Sdn Bhd (DW5).

[77] The accused denied that he went out from the meeting room during his meeting with DW5 to meet PW13 (Mohd Razip bin Mohammad). He also denied having received a bag containing cash of RM430,000 from PW13.

Allegation made by PW20 against accused

[78] The accused denied all the allegations made by PW20 against him.

[79] On 15 February 2018, the accused filed a defamation suit at the Kuala Lumpur Sessions Court (KLSC Suit No WA-B53F-2–02 of 2018) against PW20 for slandering him.

[80] PW20 is not a credible or truthful witness. PW20 gave contradictory evidence in the defamation case and in the present criminal case.

[81] On 21 December 2017, the accused's wife, Datin Suraya bt Sharer (DW2) initiated a civil suit (WA-A53-13–12 of 2017) against PW20 for extortion. The accused alleged that PW20 had demanded money from DW2, and if not paid then PW20 threatened to give evidence against the accused in this criminal case. DW2 had paid the sum of RM80,000, and via the civil suit claimed for the return of the same. On 4 October 2018, the sessions court judge in that civil suit found in favour of DW2 and ordered PW20 to repay the RM80,000 in full.

[82] PW20 was also charged in the magistrate court for extortion under s 384 of the Penal Code against DW2.

[83] The accused contended that PW20's evidence was purely one of self-preservation and self-interest.

DEFENCE WITNESSES EVIDENCE

[84] We shall now turn to the summary of evidence given by the defence witnesses.

Suraya bt Sharer @ Bahar (DW2) evidence

[85] She is the accused's wife.

[86] She was the Managing Director of Cekap Jati Sdn Bhd.

[87] On 1 November 2015, PW20 was appointed as consultant of Cekap Jati Sdn Bhd.

[88] Sometime in November 2016, the Malaysian Anti-Corruption Commission ('MACC') investigated the accused.

[89] On 24 January 2017, DW2 and her two children were served with notices by the MACC for declaration of their assets.

[90] On 19 April 2017, the Inland Revenue Board started investigation against DW2, Cekap Jati Sdn Bhd and its Group of Companies.

[91] The MACC froze DW2's account and as well as his family members' accounts for almost 12 months. Freezing of the accounts were lifted on 15 November 2017.

[92] Sometime in November 2018, Inland Revenue Board concluded their investigation and found that DW2 and her children's assets were not derived from the accused's funds or assets.

[93] PW20 demanded RM1m from DW2, failing which PW20 threatened to give unfavourable evidence against the accused in the criminal trial.

[94] DW2 gave RM80,000 cash in three payments of RM20,000, RM30,000 and RM30,000 to PW20 after that threat. It took about two months for her to settle the RM80,000. PW20 then further demanded from DW2 the balance of RM920,000.

[95] On 5 October 2017, DW2 together with the accused went to Setapak police station and lodged a police report against PW20 for extortion.

[96] On 6 October 2017, PW20 was arrested by the police.

[97] On 2 December 2017, DW2 filed civil suit against PW20 to claim back the RM80,000 that she had given to PW20.

[98] On 4 October 2018, the learned sessions court judge gave judgment in favour of DW2. PW20 did not appeal against the said judgment. Until to-date, PW20 failed to pay the judgment sum. Subsequently, DW2 filed bankruptcy proceeding against PW20.

Siti Zulaikha bt Mohd Sidek (DW3) evidence

[99] She was the executive secretary to the accused.

[100] Her office desk was located outside the accused's office. No one can enter the accused's office without her permission.

[101] On 27 June 2013 between 3pm and 5pm, the accused had scheduled an important/critical meeting with Pricewaterhouse Coopers, the THHE's auditor. The accused told DW3 several times, even before the meeting started, that he did want to be disturbed during the meeting.

[102] The meeting with Mr Ramon A Chelva (DW5) from Pricewaterhouse Coopers and his assistant started about 10–15 minutes before the scheduled time. From the Entry Log (exh P163), the time DW5 entered the THHE building was 2.49pm and exited at 3.54pm.

[103] To the best of DW3's recollection, DW3 did not leave her desk between 2pm to 4pm on 27 June 2013.

[104] The meeting was held in the accused's office. As far as DW3 can recall, neither DW5 nor the accused left the meeting room during the course of the meeting. The meeting took an hour.

[105] Nobody entered the accused's room during the course of the meeting.

[106] DW3 said that from the time she clocked in and started work and until she left for the day, she may have gone to the washroom and for prayers for a few minutes. She never left her desk before and during the course of the meeting.

[107] DW3 confirmed that she did not see Datuk Mohd Razip bin Mohammad (PW13) coming to see the accused on that day (27 August 2013). If he had come, DW3 would have known because she was at her desk from 1pm to 2pm and then between 2pm to 4pm.

[108] DW3 pushed back on PW13's testimony that PW13 was given an access card to the building that would permit him to enter THHE's building as and when he wished. DW3 said she had never given PW13 an access card to allow him to access THHE building.

[109] As far as she know, PW13 will have to register with the building security as a visitor just like any other visitor to the building.

Inar Sawanis bt Mustapa (DW4) evidence

[110] From 2 May 2012 until 14 September 2015, she served as the Internal Audit Executive of THHE. Later she left and joined Malaysia Airport Holdings Bhd as Senior Executive Internal Audit.

[111] When she first started working at THHE, the company and its subsidiary companies were going through 'migration of management system' proses from UBS System to ERP Microsoft Axapta system (ERP System).

[112] Throughout the migration proses, THHEB and its subsidiary companies were having various problems. Financial Division and Subcontracting Department were among the division affected by this migration system.

[113] Due to this migration, there could be delay in making timely payments to their contractor. This would affect the progress of the project. THHE may result high liquidated ascertained damages being impose by the suppliers/contractors if there was delay in the project. Compensation is a serious problem that will affect THHE's reputation as a whole.

[114] Internal Audit had not received any complaint or email from Coral Intoil Sdn Bhd, Bicara Sepakat Sdn Bhd or RL Offshore Sdn Bhd that their demand for payment were irregular or that there was a breach of regulation.

Ramon Albert Chelvarajasingam (DW5) evidence

[115] He was the Executive Director in Pricewaterhouse Coopers Malaysia ('PwC').

[116] Meeting between DW5 and the accused was scheduled on 27 June 2013 between 3pm and 4pm.

[117] The purpose of this meeting was for DW5 to present the scope of consultancy services that PwC could provide to THHE including potential

pricing. Nothing specific. There were are other general matters such as about organisation, talent in organisation, cost level etc that were discussed.

[118] DW5 arrived at THHE's office, which was located at Menara UOA in Bangsar around 2.30pm to 2.45pm with his junior employee.

[119] DW5 registered as a visitor at the security counter and went up to accused's office.

[120] DW5 and his colleague were shown to the accused's office and the accused secretary informed the accused of their arrival. DW5 was then shown into the accused's meeting room.

[121] The meeting lasted approximately an hour and DW5 left the accused's office at around 3.45pm.

[122] DW5 remembered that they were not interrupted by anyone during the course of the meeting and no one left the meeting at any time.

Mohd Saiful bin Mustapha (DW6) evidence

[123] From May 2013 to May 2014, DW6 served as Senior Manager Finance at THHE.

[124] When DW6 first started working at THHE, the company and its subsidiary companies were going through 'migration of management system' proses from UBS System to ERP Microsoft Axapta (ERP System).

[125] Throughout the migration prose, THHE and its subsidiary companies were having various problems. Financial Division and Subcontracting Department were among those affected by this migration system.

[126] DW6 said that if the system did not function well and did not give accurate data, it will cause major problems to the company. When DW6 left THHE, the company was still having problems with the ERP Microsoft Axapta System (ERP System).

Khairul Azam bin Jaafar (DW7) evidence

[127] In the year 2012, he served as Finance Director at Inai Kiara Sdn Bhd.

[128] In 2012, Inai Kiara Sdn Bhd was awarded a work contract by THHE Fabricators Sdn Bhd worth RM1.12m.

[129] In the middle of 2013, Inai Kiara Sdn Bhd. was awarded another work contract by THHE Fabricators Sdn Bhd worth RM1.80m.

[130] Inai Kiara Sdn Bhd received advance payment of RM 900,000 (50% from value of the contract) from THHE Fabricators on 26 June 2013 in order to help with its cash flow in the performance of the said contracts. The advance payment was necessary to ensure progress of the project and completion of the contract works within time without imposition of any liquidated damages against Inai Kiara Sdn Bhd.

Zachary Ivan Scully (DW8) evidence

[131] Presently working as legal assistant at JK Lawyers in Melbourne, Australia.

[132] In the year 2013, DW8 was working as the Head of Legal Department for THHE.

[133] Joined THHE as the General Manager of Legal and Secretarial Department on or about 15 January 2012 and resigned from the same position on or about 30 September 2016.

[134] At that time, there was migration of system from the UBS System to the new ERP software.

[135] The migration of system had caused delay in the issuance of Purchase Orders. The delay was a problem to THHE because it affected payment claims by the subcontractors, causing delay to the project progress overall giving rise to potential claims for liquidated ascertained damages. Liquidated damages can wipe out the profits from a particular project.

[136] To avoid delays, sometime advance payments were made to contractors even though they had not started works. Or sometime the work would have started without purchase order and payment would then be made.

[137] DW8 remembered at least two contractors who were given advance payments. They are Soft Triangle Services Sdn Bhd and Inai Kiara Sdn Bhd.

[138] All payments require purchase order. Urgent scenario, the contractor started work without receiving a purchase order.

[139] There was no report during his employment of any irregular payment made by THHE to Dato' Mohd Razip (PW13), Dato Hanaffi Daud (PW11) and/or Murhasmee Mokhtar (PW8).

The relevant provision of law

(a) s 23 of the Penal Code defines 'wrongful gain' and 'wrongful loss' as follows:

> 23 'Wrongful gain' and 'wrongful loss'
>
> 'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled.
>
> 'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled.
>
> A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

(b) s 24 of the Penal Code defines 'dishonestly' as follows:

> 24 'Dishonestly'
>
> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing 'dishonestly'.
>
> Explanation — In relation to the offence of criminal misappropriation or criminal breach of trust it is immaterial whether there was an intention to defraud or to deceive any person.

(c) s 402A of the Criminal Procedure Code reads as follows:

> 402A Alibi
>
> (1) The Court shall, at the time the accused is being charged, inform the accused as to his right to put forward a defence of alibi.
>
> (2) Where the accused seeks to put forward a defence of alibi, he shall put forward a notice of his alibi during the case management process.
>
> (3) Notwithstanding subsection (2), where the accused has not put forward a notice of his alibi during the case management process, he may adduce evidence in support of an alibi at any time during the trial subject to the following conditions:
>
> (a) the accused has given a written notice of the alibi to the Public Prosecutor; and
>
> (b) the Public Prosecutor is given a reasonable time to investigate the alibi before such evidence can be adduced.

(4) The notice required under this section shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.'

(d) s 405 of the Penal Code reads as follows:

405 Criminal breach of trust.

Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person, dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that, dishonestly misappropriates, or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits 'criminal breach of trust.

(e) s 409 of the Penal Code reads as follows:

409 Criminal breach of trust by public servant or agent

Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping, and shall also be liable to fine.

(f) s 409B of the Penal Code reads as follows:

409B 'Presumption'

(1) Where in any proceeding it is proved —

(a) for any offence prescribed in sections 403 and 404, that any person had misappropriated any property; or

(b) for any offence prescribed in sections 405, 406, 407, 408 and 409, that any person entrusted with property or with dominion over property had —

(i) misappropriated that property;

(ii) used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he had made touching the discharge of such trust; or

(iii) suffered any person to do any of the acts described in subparagraph (i) or (ii) above, it shall be presumed that he had acted dishonestly until the contrary is proved.

(g) s 3 of the Anti-Money Laundering, Anti-Terrorism Financing and

Proceeds of Unlawful Activities Act 2001 define:

'proceeds of an unlawful activity' means any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity;

'unlawful activity' means any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence;

'serious offence' means —

(a) any of the offences specified in the Second Schedule;

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences;

(h) s 3 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 defines money laundering as follows:

3 'Interpretation'

(1) In this Act, unless the context otherwise requires-'money laundering' means the act of a person who —

(a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or

(c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity, where:

(aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or

(bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

(i) s 4 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 reads as follows:

(1) Any person who —

(a) engages in, or attempts to engage in; or

(b) *abets the commission of, money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.*

(2) A person maybe convicted of an offence under subsection (1) irrespective

of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

THE LAW ON APPELLATE INTERVENTION

[140] The law on the appellate intervention is quite settled. An appellate court should be slow in disturbing the finding of facts arrived at by the trial judge who had the advantage of seeing and hearing the witnesses, unless there are substantial and compelling reasons for disagreeing with the finding.

[141] In *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209, Ong Hock Thye CJ (as he then was) said as follows:

> An appellate court should be slow in disturbing such finding of fact arrived at by the judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding.

[142] In *Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117; [1975] 1 LNS 195 the Privy Council held:

> (1) As in this case the learned trial judge had based his finding on the evidence of the plaintiff and his witness, his finding should not have been disturbed;
>
> (2) This was not one of those rare cases where an Appellate Court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial judge on the question of credibility. There was no reason to think that the trial judge had not taken proper advantage of his having seen and heard the witnesses.

[143] In *Ye Wei Gen v. Public Prosecutor* [1999] 4 SLR 101, Yong Pung How CJ (as he then was) said:

> It is trite law that an appellate court will be slow to overturn the trial judge 's finding of fact unless it can be shown that his decision was plainly wrong or against the weight of the evidence before him ... These cases thus stand for the principle that findings of fact by the trial judge are prima facie correct unless there are very good grounds for disturbing them.

[144] *In Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737 the Federal Court held as follows:

> Clearly, an appellate court does not and should not put a brake and not goinq any further the moment it sees that the trial judge says that is his finding of facts. It should go further and examine the evidence and the circumstances. under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh*'s case 'there resubstantial and compelling reasons for disagreeing with the finding'. Otherwise, no judgment would ever be reversed on question of

fact and the provision of s 87 of the CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless

[145] In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 2 MLRA 590, the Federal Court held as follows:

> Now, it settled law that it is no part of the function of an appellate court in a criminal case-or indeed any case-to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious an appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.

[146] In *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281, the Federal Court speaking through Nik Hashim FCJ (as he then was) held as follows:

> It is trite law that an appellate court should be slow in disturbing a finding of facts by the trial judge unless such finding is clearly against the weight of evidence which is not the case here.

[147] In *Wan Marzuki bin Wan Abdullah v Public Prosecutor* [2008] MLJU 285; [2008] 1 MLRA 479, the Court of Appeal held as follows:

> There is clear authority for the proposition that in an appeal of this nature which turns on questions of fact particularly in relation to issues of credibility, this court will be reluctant to interfere with the findings made by the primary trier of fact.

[148] In *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785, Rauf Sharif FCJ (as he then was) said:

> [26] ... the prime issue is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence.

[149] In *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523; [2013] 2 AMCR 350, Mohd Zawawi Salleh FCJ (as he then was) held as follows:

> When the finding of the trial judge is factual, however, the fact finder's decision cannot be disturbed on appeal unless the decision of the fact finding is plainly wrong (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 2 AMR 2233; [1996] 3 CLJ 163 *Zaharah bt A Kadir v Ramuna Bauxite Pte Ltd & Anor* [2012] 1 AMR 209; [2011] 1 LNS 1015 *Kyros International Sdn Bhd v Ketua*

Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650; [2013] 4 AMR 55; [2013] 1 LNS 1).

The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:

(a) by reason of some non-direction or mix-direction or otherwise the judge erred in accepting the evidence which he or she did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account, or failed to take into account some matter which he or she ought to have taken into account; or

(c) it unmistakenly appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or

(d) insofar aside judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witness which he or she accepted is not credible, as for instance. where those witnesses have on some collateral matter deliberately given an untrue answer.

[150] In *Amri bin Ibrahim & Anor v Public Prosecutor and another appeal* [2017] 1 MLJ 1; [2017] 1 CLJ 617, the Federal Court held as follows:

[51] It is trite law that the view of the trial judge as to the credibility of a witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the trial judge, who had the advantage of seeing and hearing the witness, unless there were substantial and compelling reasons for disagreeing.

In *LCY v TWY* [2019] 4 MLJ 203; [2019] 7 CLJ 158, the Court of Appeal held as follows:

[26] The principle of law on appellate intervention is settled. In *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, the Federal Court reiterated the principle as follows at p 464 (MLJ); p 476 (CLJ):

[60] It is now established that the principle on which an appellate court interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin & Anor (P) v Lee Ing Chin @ Lee Teck Seng & Anor* [2004] 4 CLJ 309; [2005] 1 MLJ 1 (at p 10) per Steve Shim CJ SS. More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785 where it was held at p 375 (MLJ); p 800 (CLJ):

> It is well settled law that an appellate court will not generally speaking intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial

appreciation of the evidence (See *Chew Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41; [1978]1 LNS 32 *Watt v Thomas* [1947] AC 484 and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309.

[151] In *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1, Zabariah FCJ when delivering the judgment of the court had said:

> [148] Given the aforesaid, we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[152] In a fairly recent case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 the Federal Court held that:

> [33] It was a long-settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong' (the Supreme Court of United Kingdom in *McGraddie v McGraddie and another* [2013] 1 WLR 2477):
>
> > [5] The 'plainly wrong' test operated on the principle that the trial court had had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acted on the printed records. The 'plainly wrong' test was not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts. As long as the trial court's conclusion could be supported on a rational basis in view of the material evidence, the fact that the appellate court felt like it might have decided differently was irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence was examined by the appellate courts (see paras 34, 76 & 148).

PETITION OF APPEAL

[153] Before us, the learned counsels for the accused raised 26 grounds of appeal.

(1) The Learned Sessions Court Judge erred in law and in fact when Her Honour convicted the accused in respect of all the 9 charges, namely 5

counts of offences under criminal breach of trust (s 409 charges) and 4 counts of offences under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (section 4(1)(a) AMLATFPUAA charges). The Learned High Court judge erred when His Lordship affirmed all the convictions;

(2) The Learned Sessions Court Judge erred when Her Honour failed to judicially appreciate the defence of the appellant. Her Honour failed to recognise that the core or basic defence of the appellant was never challenged by the prosecution, hence ought to have been accepted. Her Honour further erred in law when Her Ladyship criticised the defence as a bare denial and ruled that the evidence of the other witnesses not relevant;

(3) The Learned High Court judge seriously erred when His Lordship erroneously interpreted the application of the case of *Wong Swee Chin* [1981] 1 MLJ 212 to the disadvantage and prejudice of the accused — see paragraphs 109-113 of the Written Judgment

(4) The Learned High Court judge and the Learned Sessions Court Judge erred in law and in fact when they failed to appreciate the defence case. They ought to have asked themselves the following relevant questions:

(a) Whether the non-challenge of the accused's defence by the prosecution amounted to the accused raising a reasonable doubt to the prosecution's case? and

(b) Whether the non-challenge of the accused's defence by the prosecution amounted to the accused having successfully rebutted the presumption under section 409B(1)(b)(i) of the Penal Code? This glaring omission is a serious non-direction amounting to an appealable error.

(5) The Learned High Court judge erred when His Lordship failed to consider the defence of the accused in respect of the five (5) section 409 charges. His Lordship only applied his mind to the section 4(1)(a) AMLATFPUAA charges as can be seen at paragraph 110 of the Written Judgment. This failure to consider is a serious misdirection warranting appellate intervention;

(6) The Learned High Court judge and the Learned Sessions Court Judge erred in law and fact in convicting the accused based upon evidence of witnesses whose credibility was clearly at stake;

(7) The Learned High Court judge and the Learned Sessions Court Judge erred in law and fact in finding that the accused had dominion and/or power of disposal over the subject matter of the charges under Section 409 of the Penal Code, ie, cheques of THHE Fabricators Sdn Bhd;

(8) The Learned High Court judge and the Learned Sessions Court Judge erred in law and fact in failing to rule that the accused's defence has successfully rebutted the statutory presumption under section 409B(1) of the Penal Code on a balance of probabilities;

(9) The Learned High Court judge and the Learned Sessions Court Judge erred in law and fact in failing to accord adequate and fair judicial appreciation to the accused defence;

(10) The Learned Sessions Court Judge erred in law and fact in failing to appreciate accused's the appellant's alibi which was properly admitted under section 402A of the Criminal Procedure Code;

(11) The Learned High Court judge and the Learned Sessions Court Judge erred in law and fact in meting out sentence which is manifestly excessive without taking into account the overall circumstances of the case;

(12) The Learned High Court judge erred in law and in facts in upholding the Learned Sessions Court Judge's finding that there was no reason to refuse the evidence of PW20. The Learned High Court judge failed to appreciate that the Learned Sessions Court Judge did not critically evaluate the credibility of PW20 and had failed to consider or sufficiently appreciate that:

(a) PW20 was dishonest on multiple occasions during his cross examination;

(b) PW20 was a self-serving witness and had motive to lie as a witness to implicate the appellant;

(c) PW20 was a self-serving witness and had motive to lie because he was trying to save himself for failing to properly discharge his duty as an employee of THHE ('the Company');

(d) PW20's allegation that he was told that the appellant was required to pay a sum of 1.5% of the Permas Contract to Murphy was inconsistent with the documentary evidence showing the value of the Permas Contract;

(e) PW20's conduct during his employment at Cekap Jati showed that he was unworthy of credibility because it demonstrated his propensity to provide evidence in a manner that was most favourable to him; and

(f) PW20 has an axe to grind against the appellant and there was evidence that PW20 had subsequently defamed the appellant and extorted the appellant's wife.

(13) The Learned High Court judge erred in law in failing to appreciate and consider that there is a difference between the property in a cheque and property in money in a bank account. The Learned High Court judge failed to appreciate that the 'property' described in the charges were cheques which has been paid to the named payees of the various cheques and accordingly, there was no misappropriation or conversion of the cheques within the meaning of section 405 of the Penal Code;

(14) The Learned High Court judge erred in law and in facts in finding that entrustment of property has been established when the appellant exercised dominion and control over the payments which were made. The Learned

High Court judge failed to appreciate or sufficiently consider that the approval authority matrix of THHE required each of the signatories to the cheques to exercise independent control when issuing any cheques;

(15) The Learned High Court judge erred in law and in fact in upholding the conviction of the appellant in relation to criminal breach of trust of the cheque dated 30 April 2013 for the sum of RM 400,000 despite the appellant having been acquitted of the money laundering charge in respect of the same cheque. The Learned High Court judge failed to appreciate or sufficiently consider that the alibi of the appellant ought to have been accepted for both charges given that the evidence relied on by the prosecution to establish both the criminal breach of trust and the receipt of the sum of RM400,000 were identical. The Learned High Court judge erred in law and fact in failing to consider or sufficiently appreciate that there was insufficient evidence for the Learned Sessions Court Judge to convict the appellant of criminal breach of trust having accepted the defence of alibi;

(16) The Learned High Court judge erred in law and in fact in failing to appreciate or sufficiently consider that the sum of RM575,800 in relation to CBT 5 was for works done and therefore could not amount to any wrongful loss to the Company;

(17) The Learned High Court judge erred in law and in facts in finding that the appellant had pocketed the cash for himself, amounting to an act of misappropriation. The Learned High Court judge failed to consider or sufficiently consider that save for the testimony of PW8, PW11 and PW13, there is no independent evidence to demonstrate that the appellant had received the cash for himself;

(18) The Learned High Court judge erred in law when His Lordship failed to consider or sufficiently appreciate that the possibility that PW8, PW11 and PW13 had retained the monies for their own use;

(19) The Learned High Court judge erred in law and in fact in failing to appreciate or sufficiently consider the fact that there was a gap in the prosecution's case as the investigating officer failed to investigate the possibility that PW8, PW11 and PW13 had retained the funds for their own personal use. The Learned High Court judge failed to consider and appreciate that the Defence had established through concessions in cross examination that PW8, PW11 and PW13 had lifestyles and assets that far exceeded their incomes;

(20) The Learned High Court judge erred in law and in fact when held that the evidence of PW8, PW11 and PW13 was credible and believable. The Learned High Court judge failed to consider or sufficiently appreciate that the Defence had produced sufficient evidence to demonstrate that PW8, PW11 and PW13 may have retained the monies that they withdrew for their own use;

(21) The Learned High Court judge erred in law in failing to appreciate that the Learned Sessions Court Judge had used the particulars of one offence to support and corroborate the others;

(22) The Learned High Court judge erred in law and in fact in failing to sufficiently appreciate that the Learned Sessions Court Judge had failed to apply the necessary warning when applying similar facts evidence;

(23) The Learned High Court judge erred in law and in fact in failing to appreciate that the Learned Sessions Court Judge failed to sufficiently warn herself when relying on the evidence of PW8, PW11 and PW13 to support and corroborate one another because they were accomplices;

(24) The Learned High Court judge erred in law and in fact in failing to appreciate that the Learned Sessions Court Judge failed to caution herself regarding the use of accomplice evidence without corroboration; and

(25) The Learned High Court judge erred in law in failing to consider or sufficiently appreciate the fact that there was no wrongful loss to to the Company as it remained indebted to Bicara Sepakat Sdn Bhd;

(26) The Learned High Court judge failed to appreciate that the prosecution had failed to prove that the Company had overpaid Bicara Sepakat Sdn Bhd Corail Intoil Sdn Bhd and/or RL Offshore Sdn Bhd.

OUR DECISION

[154] We shall first deal with CBT Charge No 5 and AMLATFA No 5. The learned Deputy Public Prosecutor, fairly, and quite properly, conceded to the appeal in respect of both CBT Charge 5 and AMLATFA 5 as it was clear from the evidence of PW 1 (Kamaruzaman bin Ahmad, the chief operating officer of THHE that the payment of RM575,800 made to RL Offshore Sdn Bhd was pursuant to a valid and legitimate agreement with RL Offshore Sdn Bhd for work done under that contract. So we therefore allowed the appeal in respect of these two charges and set-aside the conviction and sentences in respect of the same.

[155] We shall now deal with the remaining charges. One of the main ground argued by the learned counsel for the accused was that both the learned sessions judge and the learned High Court judge erred in law and in fact when they failed to judicially appreciate the defence case. In particular, that both the courts below failed to recognise that the defence of the accused in respect of all the nine charges was not challenged by the prosecution.

[156] It was strenuously contended for the accused that for the AMLATFA Charges No 2, No 4 and No 5 the learned sessions court judge has misdirected herself in the following areas, namely:

(a) in not appreciating that the defence of the accused was not challenged by the prosecution. Thus, it means the prosecution accepts the evidence of the accused; and

(b) consequently, unfairly and wrongly describing the defence of the appellant as a bare denial. The defence of AMLA charge 5 was dismissed by the learned sessions court judge in a one liner-see p 110 (para 104, Vol 1).

[157] As far as Charge CBT 5 and AMLATFA 5 is concerned, we have already decided that the conviction for both the charges could not stand, and the matter has been put to rest.

[158] As for CBT Charge No 3 and corresponding AMLATFA Charge No 3, the defence of the accused was one of *alibi*. The notice of alibi given by the accused under s 402A of the Criminal Procedure Code states that the accused was having a meeting in his office with DW5 at the material date and time as stated in both the charges.

[159] To support his alibi the accused called DW3 (Siti Zulaikha bt Mohd Sidek) and DW5 (Ramon Albert Chelvarajasingham) essentially to prove that the accused was having an uninterrupted meeting with DW5. It was the accused's defence that SP13 (Dato' Mohd Razip bin Mohammad) did not come to his office and consequently he did not give the accused the sum of RM430,000 as alleged.

[160] Counsel for the accused strongly contended that there was in effect no challenge to the accused's alibi evidence and by reason of the non challenge, the accused's alibi was not negated by the prosecution. It was submitted that the learned sessions court judge ought to have held that the prosecution by reason of the non-challenge had conceded to the defence alibi and further the evidence of SP13's on this point was suspect when SP13 said that he arrived at 3.30pm and delivered the cash to the accused when the visitor log book of THHE which is exh P163 showed that DW5 came for the meeting with the accused at 2.49pm and left at 3.54pm.

[161] In our view, we find that the evidence given by DW3 and DW5 and the entry in visitor log book (P163) supported the accused's defence of alibi and that there was a failure by the trial judge to judicially appreciate this crucial evidence. In our considered view there were merits in this argument. Even though it was not disputed that the accused was at his office at the material time but the critical issue here is whether PW13 was present at the accused's office at 3.30pm and delivered the money to the accused as stated in the charge. We are of the view that the finding of the trial judge in this regard went against the

grain of evidence. It would be unsafe to sustain the conviction handed down by the learned sessions court judge and the High Court judge in respect of both these charges and thus appellate intervention is therefore warranted. Hence, we allowed the appeal in respect of CBT No 3 and AMLATFA No 3 charges and set aside the conviction and sentence handed down by the learned High Court judge in respect to these two charges.

[162] However, it is important to stress at this stage, that even though we were with the accused on the alibi issue in respect of the CBT No 3 and AMLATFA No 3 charges, it cannot be gainsaid that PW13 may have made an untruthful statement or wholly untrue testimony sufficient to destroy the credibility of PW3. There was some doubt in respect of the time stated in these two charges, and we gave the benefit of that doubt to the accused. This does not mean that PW13's credibility as a whole was affected. The matter of credibility or veracity of PW13's testimony in respect of the other remaining charges would have to be determined when dealing with these charges. We were of the view that in this regard the learned trial judge was in a better position to decide this since she was the one who saw and heard PW13's testimony. Further, it is not appropriate at this stage for us to deal with the credibility issue of PW13. We will cross that bridge when we come to it.

[163] Now we shall deal with the other main thrust of the submission by the learned counsel for the accused which revolved around the failure of the prosecution to challenge the narrative of the defence in cross-examination of the accused and his witnesses as regards all the remaining CBT and AMLATFA charges.

[164] The evidence which the learned counsel sought to rely on essentially was as per the accused's written statement (para 56 to para 60) which are reproduced herein:

> 56. Saya sesekali menegaskan bahawa kesemua pembayaran kepada kontraktor-kontraktor berkenaan melalui cek ditandatangani oleh saya adalah sah disisi undang-undang dan sesuai bagi perkhidmatan dan/atau kerja yang dilaksanakan.
>
> 57. Saya menafikan segala tomahan penerimaan wang oleh saya, samada selaku CEO THHEB atau pengarah THHEFSB, daripada Encik Murhasmee Bin Mukhtar (SP-8), Dato Mohd Razip Bin Mohammad (SP-13) serta Dato' Hanaffi Bin Daud (SP11).
>
> 58. Saya juga menekan bahawa saya, samada selaku CEO THHEB atau pengarah THHEFSB, tidak pernah pada bila-bila masa membuat permintaan wang daripada Encik Murhasmee Bin Mukhtar (SP-8), Dato' Mohd Razip Bin Mohamad (SP-13) serta Dato' Hanaffi Bin Daud (SP-11).
>
> 59. Sepanjang tempoh perkhidmatan saya selaku CEO THHEB dan pengarah THHEFSB, saya tidak pernah menghadapi sebarang siasatan dalaman oleh pihak

lembaga pengarah dan/atau pihak jawatankuasa pemberi maklumat ('Whistle Blower Committee') THHEB dan THHEFSB.'

60. Pada akhir siasatan berkenaan kelima-Iima (5) pertuduhan ini, harta-harta saya serta harta-harta ahli keluarga saya telah dipulangkan tanpa sebarang pelucuthakan ('return without forfeiture') memandangkan kesemua ini bukanlah hasil daripada aktiviti-aktiviti menyalahi undang undang mahupun hasil daripada pecah amanah dibawah s 409 KK.

[165] The learned counsel for the accused contended that the above evidence which was contrary to that of the prosecution witnesses, namely SP8, SP13 and SP11, was not challenged by the prosecution during cross-examination. As such the learned counsel argued that the version of the accused must be accepted as it remains unchallenged. Learned counsel cited a long lists of authorities in support of that proposition, and in particular counsel relied on the dicta in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 21 to further that argument.

[166] Be that as it may, it is worthy of emphasis that the Federal Court in *Wong Swee Chin* also held that there is an exception to this general rule where:

(a) the story (testimony) is itself of an incredible or romancing character;

(b) the abstention arises from mere motives of delicacy;

(c) when counsel indicates that he is merely abstaining for convenience to save time; and

(d) where several witnesses are called to the same point, it is not always necessary to cross-examine them all.

[167] In reply, the learned deputy public prosecutor referred to the case of *Chan Chi Kong v The Queen* [2002] HKCU 941 where Hogan CJ of Hong Kong in this unreported judgment held that:

To say that failure to cross-examine amounts, in itself, to an admission does, I think go too far ...

[168] So the essential contention by the learned deputy public prosecutor was that the non cross-examination by itself does not amount to an admission. Though the prosecution did not cross-examine the accused in respect of some of those evidence that does not mean it is tacit admission of the defence version. It must noted that in *Wong Swee Chin* itself the Federal Court spoke of an exception to the general rule on the failure to cross-examine and its consequences. Learned deputy public prosecutor argued that even if there was failure to cross-examine it was not fatal to the prosecution case and that the court must still consider the totality of the evidence to ascertained if it conclusively point to the guilt of the accused. In this regards we were referred

to a passage in *Wong Swee Chin* where the Federal Court held at p 213 as follows:

> In our view, although there was a misdirection by the trial judge on this point it did not affect the correctness of the verdict as the totality of the evidence points conclusively to the guilt of the appellant.

[169] In addition, the learned deputy further cited the Singapore case of *Liza bte Ismail v Public Prosecutor* [1997] 2 SLR 454 where Yong Pung How CJ held as follows:

> Although the general proposition is that testimony not subjected to contradiction in cross-examination may be treated as unchallenged and thus accepted by the opposition party, the court is still entitled to reject such testimony: *Patric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505, per Samuels JA at p 507; see also Hunt J's observations at p 18 in Allied Pastoral Holdings. *A careful evaluation of the totality of the evidence must still be undertaken to determine the cogency and weight of such testimony.* In other words, it need not always follow that the whole of the appellant's testimony would have to be accepted by the court, nor that the conviction in respect of DAC 9796 would ineluctably be considered flaw.'

[170] In another Singapore decision of *Awtar Singh s/o Mangar Singh v Public Prosecutor* [2000] 3 SLR 439, the court held as follows:

> I did not find it strictly necessary for the prosecution to put to the appellant that he saw the immigration offenders during his visits. *It was apparent to the appellant what the prosecution's case was* and it was that the immigration offenders saw him at the premises collecting rent and performing various other tasks pertaining to the upkeep of the premises. *His defence was a complete denial* that he had ever seen these immigration offenders. That being the case, in my view, it could not be said that the failure to put the question to the appellant resulted in any procedural unfairness to him, in the sense that he had been deprived of an opportunity to explain his evidence which would amount to nothing more than another denial that he had not seen them before.

[171] In the Malaysian case of *Public Prosecutor v Radhakrishnam Syam & Ors and another case* [2023] MLJU 1324, the court held that:

> [108] In my considered judgment, *Public Prosecutor v Cheah Leong Foo* does not stand for a general proposition of law that a reasonable doubt must arise in all such circumstances where the prosecution has failed to cross examine the defence witness on the fact in dispute. Rather, the court must still proceed to weigh the relative merits of the competing assertions, mindful of the standard of proof that must be discharged by the respective parties. The ordinary principles would apply on evaluating the evidence of the witness of the defence: does the court believe the defence witness? If so, it must acquit. If it does not believe the witness, the court must proceed to ask itself a further question: has the testimony of the witness given rise to a reasonable doubt? If the answer is in the affirmative, then court must acquit.

[172] Now the issue before us is whether the failure of the learned trial judge to consider this unchallenged evidence, had occasioned a failure of justice and denied to accused to a fair trial. Did the accused know what he was being tried for and whether he had been given a full and fair chance to defend himself. If the answers are in the affirmative, then there has been no prejudice to the accused and no failure of justice. But if the answers are in the negative, then the benefit of doubt must be given to the accused.

[173] The duty of an appellate court in dealing with an appeal where misdirection has occurred is well settled by the Supreme Court in *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251, where the court held as follow:

> Misdirection is not of itself a sufficient ground to justify interference with the verdict; the appellate court must proceed respectively to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has occasioned a failure of justice. If the court so finds, then it has a duty to interfere. In deciding whether there has been a failure of justice in consequence of a misdirection, the appellate court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent one convicted (see *Abdul Rahim v King Emperor* (1945–46) 73 IA 77).

[174] The overriding concern now is whether there has been a failure of justice or miscarriage of justice in the eye of the law arising from the failure of the prosecution to challenge the core assertion of defence.

[175] From our close scrutiny of the record and in particular the judgment of the learned trial judge and the learned High Court judge, we are of the considered view that failure of the prosecution to cross-examine the accused on a crucial part per se does not amount to an admission or acceptance of the accused's testimony. We must consider the totality of the evidence and decision must be based on an examination of all the evidence presented and not evidence in isolation. Moreover, it is also apparent from the learned trial judge's comprehensive judgment that she had directed herself on the issue of credibility of the prosecution witnesses and accepted their evidence.

[176] For ease of reference, the findings of the learned trial judge on credibility can be clearly seen at appeal record encl 13 Vol 2, pp 90–91 where she said:

> Kredibiliti saksi-saksi
>
> [64] Mahkamah telah menilai keterangan semua saksi dalam kes ini dan mendapati bahawa keterangan mereka adalah konsisten antara satu sama lain walaupun telah disoal balas secara bertubi-tubi oleh pihak pembelaan. Keterangan SP20 iaitu saksi utama dalam kes ini secara keseluruhannya boleh diterima dan tiada sebab untuk Mahkamah menolak keterangan SP20. Begitu juga dengan keterangan SP4 dan SP18. Ketiga-tiga mereka merupakan saksi penting yang menjelaskan secara

terperinci mengenal kejadian yang telah berlaku, iaitu dari mula arahan diberi oleh OKT sehingga cek didepositkan ke akaun syarikat BSSB, CISB dan RL Offshore. Dalam melaksanakan arahan-arahan daripada OKT, SP20, SP18 dan SP4 tidak boleh dipersalahkan kerana mereka cuma menurut perintah OKT yang merupakan pegawai atasan mereka. Mereka juga tidak mendapat apa-apa manfaat atau keuntungan hasil dari perbuatan tersebut.

[65] Begitu juga dengan keterangan SP8, SP11 dan SP13 yang merupakan pihak yang menerima dan menunaikan cek-cek yang diberi kepada syarikat mereka dan menyerahkan wang tersebut kepada OKT. Keterangan mereka bahawa cek-cek tersebut bukan merupakan bayaran atas kerja-kerja yang dilaksanakan oleh syarikat mereka dan syarikat tidak membuat tuntutan untuk pembayaran tersebut hendaklah diterima. Sebagaimana SP20, SP18 dan SP4, mereka juga tidak mendapat sebarang keuntungan hasil pengeluaran wang THHE ini. Mereka menyatakan bahawa mereka dalam keadaan serba salah dan terpaksa menurut kehendak OKT memandangkan mereka mempunyai kontrak kerja dengan THHE.

[177] In short, in her grounds of judgment, the learned trial judge accepted the evidence of PW4, PW8, PW20, PW11 and PW13 after holding that there were no cogent reasons to disbelieve them.

[178] Having made the above finding, the learned trial judge then went on to make the following conclusion at paras 68 and 69 of the judgment:

[68] Keterangan SP8, SP11 dan SP13 dikuatkan lagi dengan keterangan SP20, SP18 dan SP4 yang merupakan pegawai-pegawai di bahagian kewangan THHE. Keterangan SP8, SP11 dan SP13 bahawa tiada tuntutan bayaran dibuat oleh pihak syarikat disokong oleh keterangan SP20, SP18 dan SP4 yang menyatakan bahawa OKT yang memberi arahan supaya pembayaran dibuat tanpa dokumen sokongan seperti invois dan pesanan belian (*purchase order*) yang dikemukakan oleh pihak syarikat.

[69] Mahkamah mendapati bahawa saksi-saksi pendakwaan SP20, SP18 dan SP4, SP8, SP11 dan SP13 adalah merupakan saksi-saksi yang boleh dipercayai dan telah memberi keterangan yang konsisten sepanjang perbicaraan. Tiada sebab untuk mereka memberikan keterangan palsu dan berkomplot untuk memfitnah OKT.

[179] In this respect, the learned High Court judge accepted these findings when he held at paras 54–59 appeal record encl 11 Vol 1 of his grounds judgment as follows:

[54] In finding that the prosecution's witnesses were credible, the learned trial judge reasoned that the prosecution's witnesses were consistent in their evidence despite the rigorous cross examination. According to the learned trial judge, she had no reason to reject the evidence of PW20 despite the challenge by the defence that PW20 may be a self-serving witness and there were various contradictions in his testimony.

[56] The learned counsel anchored the challenge on the credibility of the prosecution's witnesses on the following grounds:

(a) that the learned trial judge failed to critically evaluate the conduct and behaviour of PW20 as a whole;

(b) that the learned trial judge failed to consider the defence evidence which showed that PW8, PW11 and PW13 was not credible as they may have retained the monies they withdrew for their own purpose; and

(c) that the conviction was based on the evidence of PW8 and PW20 whose credibility was clearly at stake.

[57] In my considered view, the learned trial judge had correctly considered and assessed the credibility of PW8, PW11, PW13 and PW20 in accordance with established legal principles. In her grounds of judgment, the learned trial judge had considered certain material facts. These facts are material as they may be used as a testbed in assessing the credibility of the relevant witnesses in the circumstances of present appeal. They are as follows:

(a) instructions were given for cheques to be prepared even without any invoices or claims for payments;

(b) sham invoices and sham receipts were made for the various payments;

(c) certain cheques were encashed and the monies were personally delivered to the accused;

(d) certain cheques were replaced pursuant to instructions for payments to be credited directly into the recipients' bank accounts despite no request for such direct remittances;

(e) PW11 of RL Offshore went on to claim for the balance payment of RM575,800.00 in respect of the first milestone claim despite a cheque for the same amount has been prepared and paid out;

(f) at the request of the accused, PW8 had to make good the claim made by PW11 whereas the payment should be made by THHE instead;

(g) at the material times, Bicara Sepakat, Coral Intoil and RL Offshore all had subsisting projects with THHE; and

(h) as the finance executives of THHE, PW4 and PW18 were merely following instructions and had no authority of their own to prepare the cheques for the respective amounts without instructions. Both of them had not gained anything.

[58] Had the payments were for valid reasons, there would not be questions about instructions for cheques being prepared without any claim for payments, there would not be sham invoices and receipts issued, there would not be similar claims made despite payment for the same amount having been 'made', there would not be payments having had to be made by Bicara Sepakat to RL Offshore.

[59] I am of the considered view that the findings of the learned trial judge in respect of credibility and assessment of the totality of the evidence accords with the

probabilities of the case. They did ring true. ln assessing credibility of the witnesses, I am thus of the considered view that the learned trial judge had properly availed herself of the audio-visual advantage.

[180] Now, we at this court also find ourselves in agreement with the above finding made by both the learned trial judge and the learned High Court judge. The appeal by the accused turns upon pure questions of fact. These were findings of fact made by the trial judge who had the audio and visual advantage of observing and assessing the demeanour of the prosecution's material witnesses testifying before her, something which we do not possess. Such findings of fact by the trial judge is therefore to remain undisturbed unless of course if the fact finding is plainly wrong, which we find is not the case here.

[181] On the evidence, we are fully satisfied that the learned trial judge had not erred and her findings were fully supported by the abundance by both oral and documentary evidence heaped against the accused. In our view, it leaves no leeway for appellate interference in the circumstances of this case.

[182] It must be borne in mind that, Bicara Setakat Sdn Bhd, Coral Intoil Sdn Bhd and RL Offshore Sdn Bhd all had subsisting projects with THHE. Certainly, they do not want to lose their business deals with THHE. They were at the mercy of the accused. The accused took undue advantage of the business relationship that THHE had with these companies. PW8, PW11 and PW13 had no choice but reluctanty to follow the demands of the accused in order not to jeopardise their working relationship with the accused. They had but to follow all instructions of the accused. They were caught between the proverbial devil and the deep blue sea. Hence, they had no reasons to lie or made up stories regarding the accused's involvement in these act.

[183] When all the evidence is considered even with an indulgent eye, it is impossible for any court to doubt that the request came from the accused. He had the opportunity and authority to make the request. The prior arrangement and the manner in which the payments were made is a relevant consideration in the present case and it certainly did not reflect an innocent mind on the part of the accused. It is in evidence that PW8, PW11 and PW13 were 'coerced' to made payment in one lump sum, with no invoices.

[184] To conclude, it is significant to emphasise that, we find no substantial miscarriage of justice to have occurred to the accused person in the present appeal before us by failure of the prosecution to challenge or put the essence of their case to the accused or his witnesses. It is apparent on our careful perusal of the notes of evidence, that such failure does not go to the credibility of the prosecution witnesses nor does it amount to an acceptance of the defence

witnesses' evidence. The accused knew well what the case was against him when the prosecution closed its case and had been afforded all the opportunity to present his defence.

[185] Moving on, in considering the defence testimony for criminal breach of trust, the learned trial judge at pp 93–95 appeal record encl 13 Vol 2, had this to say:

> Perpindahan sistem daripada Microsoft Axapta kepada sistem ERP
>
> [70] Pihak pembelaan menyatakan bahawa penggunaan perkataan 'consultancy'di dalam invois adalah kerana masalah yang dihadapi oleh THHE akibat daripada perpindahan sistem Microsoft Axapta kepada ERP di mana sistem yang baharu hanya membekalkan deskripsi yang terhad. Untuk mengatasi masalah ini, pengurusan atasan THHE terpaksa menggunakn label 'consultancy' untuk meluluskan pembayaran atas kerja-kerja yang dilaksanakan oleh kontraktor. Mengenai isu ini, Mahkamah memutuskan bahawa sekiranya benar sekalipun masalah ini dihadapi oleh THHE, ia tiada kaitan dengan 5 pembayaran yang diarahkan o!eh OKT untuk dibayar kepada BSSB, CISB dan RL Offshore di mana pihak syarikat sendiri menafikan membuat apa-apa tuntutan kepada THHE.
>
> Tiada sebarang aduan dibuat kepada bank dan/atau dibawah polisi 'whistle blower'
>
> [71] Ketiadaan sebarang aduan dibuat dibuat oleh pihak syarikat, polis, dan/atau pihak SPRM kepada pihak bank bahawa transaksi berkaitan kelima-lima cek tersebut merupakan transaksi yang menyalahi undang undang1 tidak menafikan fakta bahawa OKT telah dengan curangnya menyalahgunakan harta THHE, iaitu 5 cek yang menjadi subjek pertuduhan dalam kes ini. Begitu juga kegagalan kakitangan dan/atau lembaga pengarah THHE membuat sebarang aduan di bawah polisi 'whistle blower'berkenaan lima pembayaran kepada ketiga-tiga syarikat tersebut tidak sama sekali menjejaskan kes pihak pendakwaan. Tiada aduan dibuat tidak bermakna kejadian tersebut tidak ·berlaku.
>
> [72] Berdasarkan keterangan saksi-saksi pendakwaan dapatlah dirumuskan bahawa:
>
> (a) OKT mengarahkan penyediaan kelima-lima cek dalam keadaan di mana tiada kerja dilakukan oleh kontraktor-kontraktor dan mereka juga tidak membuat tuntutan untuk pembayaran.
>
> (b) OKT dan SP20 telah menandatangani 3 daripada 5 cek tersebut.
>
> (c) 2 cek lagi (P16 dan P10) ditandatangani oleh SP20 dan SP19 bagi menggantikan cek P26 dan P27 yang telah ditandatangani oleh OKT dan SP20 sebelum itu. Penggantian cek-cek juga dibuat atas arahan OKT bagi menukar cara bayaran.
>
> (d) OKT memaklumkan pihak syarikat bahawa cek-cek pembayaran dari THHE telah dimasukkan ke dalam akaun syarikat.
>
> (e) OKT mengarahkan penerima cek (SP8, SP11 dan SP13) supaya menunaikan cek-cek tersebut dan menyerahkan wang secara tunai kepada OKT.

(f) Pihak syarikat menunaikan eek tersebut dan menyerahkan wang dalam bentuk tunai kepada OKT (kecuali bagi jumlah RM400,000.00 di mana penyerahan kepada OKT tidak dibuktikan berikutan alibi OKT yang tidak disangkal oleh pihak pendakwaan).

(g) Invois dikeluarkan selepas bayaran diterima daripada THHE bagi menjustifikasikan pembayaran yang telah dibuat.

[73] Berdasarkan fakta yang dinyatakan di atas dapat dilihat modus operandi yang digunakan oleh OKT dalam melaksanakan atau merealisasikan hasratdan niat untuk menyalahgunakan wang syarikat THHE dengan mempergunakan SP8, SP11 dan SP13 yang mempunyai hubungan kerja dengan THHE. Adalah tidak logik pihak syarikat tidak mahu membuat sebarang tuntutan jika kerja-kerja tersebut telah sebenarnya dilakukan. Seterusnya, jika benar pembayaran tersebut untuk kerja-kerja yang sebenarnya dilakukan sebagaimana ditimbulkan oleh pihak pembelaan, mengapakah OKT mengarahkan supaya wang tersebut dikeluarkan dan diserahkan kepada OKT dalam bentuk tunai? Tambahan pula bagaimana pembayaran untuk jumlah yang sebegitu besar boleh diluluskan oleh OKT tanpa sebarang dokumen sokongan.

[186] The learned trial judge had carefully considered the accused defence, and in particular that advance payments had to be made as a result of the system migration. Hence, for the CBT charges, we see no reasons to interfere with the findings made by the learned trial judge as well as the learned High Court judge when they had safely concluded that the defence raised by the accused was wholly untenable and that the accused had failed to rebut the presumption of having acted dishonestly on the balance of probabilities. We were satisfied that both the learned judges had meticulously gone through and correctly appreciated the evidence before them and applied the law correctly.

[187] The defence of the accused that the payments made to Corail Intoil Sdn Bhd and Bicara Sepakat Sdn Bhd were in fact advance payments for the project they were having with the company were mere bare denials and not true. It was merely an excuse to cover up his unlawful activity.

[188] Additionally, it was also wrong for the accused to make payments when payments were not due to the contractors. What more when SP8 and SP13 had confirmed that the payments were not related to the work done and they did not make the claim to THHE.

[189] The other issue advanced by the learned counsel for the accused is that PW8, PW13, PW20 were accomplices whose evidence was uncorroborated. Now, even if they were accomplices, we find that they there were ample evidence of corroboration of the testimony of these witnesses.

[190] It is our considered view that the law on accomplices is well settled. In

the case of *Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593; [2005] 1 CLJ 11 Augustine Paul JCA (as he then was) had this to say:

> In commenting on the significance of the need for corroboration with regard to the identity of the accused *Sarkar on Evidence* (15th Ed) Vol 2 says at p 2105:
>
> > It is an established rule of practice that an accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches. The accomplice may know every circumstances of the crime and while relating all the other facts truly, may in order to save a friend, or gratify an animosity, name some person as one of the criminals who was innocent of the crime (*R v Krishna Bhat*, 10B 319; see also *R v Malapa*, 11 BHC 196; *R v BudhduNanku*, 1B 475).

[191] In *Davies v Director of Public Prosecutions* [1954] AC 378, it was held that:

> an accomplice is a person who participates in the commission of the actual crime charged against the accused. He is to be a particeps criminis. There are two cases, however, in which a person has been held to be an accomplice even if he is not a particeps criminis. Receivers of stolen property are taken to be accomplices of the thieves from whom they receive goods, on trial of theft. Accomplices in previous similar offences committed by the accused on trial are deemed to be accomplices in the offence for which the accused is on trial, when evidence of the accused having committed crimes of identical type on the occasions to be admissible to prove the system and intent of the accused in committing the offence charged.

[192] In *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466, the Court of Appeal held:

> In our judgment, the correct test for determining whether a witness is an accomplice is that laid down by Thomson CJ in *Chao Chong v Public Prosecutor* [1960] 1 MLJ 238; [1959] 1 LNS 11: The true question, however, was not the technical one of whether the witness could have been convicted for his participation in the offence if he had been prosecuted. The true question was whether, having regard to his participation in the offence and having regard to all the circumstances of the case, his evidence was to be regarded with suspicion and as possibly so tainted as to invite if not to demand corroboration before it was accepted.

[193] In *Farose bin Tamure Mohamad Khan v Public Prosecutor and other appeals* [2016] 6 MLJ 277; [2016] 9 CLJ 769, this court made the following observations at para 108 of the judgment:

> [108] As a starting point, s 133 of the Evidence Act 1950 provides that an accomplice is a competent witness against an accused person, and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Illustration (b) of s 114 of the same Act provides that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In respect of the nature and extent of the corroboration, Raja

A Azlan Shah CJM (as His Majesty then was) in *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144 (at p 146); [1980] 1 LNS 117 formulated the rules as follows:

(1) There should be some independent confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance;

B

(2) The independent evidence must not only make it safe to believe that a crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particulars the testimony of the accomplice; and

C

(3) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another.

D **[194]** In the case of *Kurchang Singh Wedhawa Singh v Public Prosecutor* [1989] 2 CLJ 442 the court said:

corroboration may come from the other prosecution witnesses or from the accused. Deliberate lies or incriminating conduct in a material particular can constitute corroboration.

E

[195] In the case before us, there was in fact abundance of independent and compelling evidence confirming the evidence of PW6, PW8, PW11, PW13 and PW20 in material particulars. One such example is the evidence of PW4 and PW18 as to the non-compliance of the payment procedure which are the corroborative evidence in support of PW20's testimony. The withdrawal of the monies from the company's respective bank accounts etc are all corroborated via oral and documentary evidence. In the end the cash eventually ended up with the accused.

F

G

[196] Moving on to the next issue, learned counsel for the accused contended that, learned the High Court judge erred in law and fact in failing to appreciate that the trust property identified in the CBT charges were cheques issued to the respective contractors, namely RL Offshore Sdn Bhd Bicara Sepakat Sdn Bhd and Coral Intoil Sdn Bhd. The learned judge was said to have fallen into error in continuing to equate the property in the cheque with the property in the money or funds of the company.

H

[197] It was further submitted that the money in THHE's account is different from the property in a cheque of THHE. It was contended that it has long been understood that when a cheque is filled up by the drawer in favor of a payee, the property in the cheque belongs to the payee not the drawer. Council further contended that the property in the cheque properly understood as a right for the named payee to sue the drawer in the event of a default. In other words, it

I

was contended that the property in a cheque is a chose in action. This, the counsel argued was critical to banking law because the property in a cheque is transferable and allows for a cheque to become a negotiable instrument. Hence, the argument was that there is no criminal breach of trust committed as stated in the charge.

[198] In addition to that, it was contended that each of the named payees named payees of the cheques in fact received their respective cheques that was issued by THHE. They also each received the sums stated in that cheque. These facts were not disputed by the prosecution. The property in these cheques according to the counsel has therefore been passed to the payee and accordingly, the property in the cheque, which was a chose in action, has been extinguished. In other words, counsel argued that misappropriation of a cheque can only be said to have occurred if the accused took the cheque and did not name the payee and the payee did not receive the cheque.

[199] Hence, it was submitted that it is incorrect for the learned High Court judge to hold that there was CBT of the cheques when the narrative and evidence presented by the prosecution was in fact the alleged misappropriation of the monies belonging to THHE.

[200] Learned counsel further argued that from a reading of the grounds of judgment, the learned High Court judge had wrongly equated the 'trust property' in the cheque with the company's cash. It was submitted that the property in a cheque and the property in the funds are two separate and distinct properties which cannot be used interchangeably and do not equate to one another.

[201] With the greatest of respect, we beg to differ. We cannot accept this line of argument. To suggest that a distinction must be drawn between a property in cheque and property in cash is entirely fallacious. Such proposition of law is not in keeping with the language or spirit of s 405 of the Penal Code.

[202] Here is a case where accused is the Chief Executive Officer of THHE. Being in that position he was entrusted with the property of the company including the cheques which are the subject matter of the instant appeal. The accused was one of the authorised signatories for the company's account. The cheques issued had money value and was indeed a property within the meaning of s 405 of the Penal Code. The intention of the drawer at the time for the cheques issued is the material test. The cheque passes the property of THHE namely the money value stated on the cheque to the payee.

[203] The emphasis here again is that these cheques were prepared and issued to the respective contractors without any invoices or claims for payment made

upon instruction given by the accused to his officers. Since that is so, the irresistible conclusion is that the accused's conduct or act was actuated by dishonest intention to subsequently misappropriate THHE's money/funds for his own use through the use of these cheques.

[204] In *Sathiadas v Public Prosecutor* [1970] 2 MLJ 241; [1970] 1 LNS 142; [1970] 1 MLRH 166, His Royal Highness, the late Raja Azlan Shah J (later LP) had this to say:

> The gist of the offence of criminal breach of trust is entrustment and dishonest misappropriation or conversion to own use. Once the prosecution have succeeded in proving the receipt of the money for a particular purpose the case of entrustment is made out. Dishonest misappropriation or conversion to own use involves wrongful gain to the appellant or wrongful loss to his employers for the period of the retention of the money. That must depend on the facts and circumstances of each case. ·Criminal breach of trust is not an offence which counts as one of its factors, the loss that is the consequence of the act, it is the act itself, which in law, amounts to an offence. The offence is complete when there is dishonest misappropriation or conversion to one's own use, or when there is dishonest user in violation of a direction, express or implied, relating to the mode in which the trust is to be discharged.

[205] Seven cheques were encashed. Two cheques were replaced pursuant to instructions for payment to be credited directly into the respective bank accounts of Bicara Sepakat Sdn Bhd and Coral Intoil Sdn Bhd, despite there being no request for such direct remittances. PW8, PW11 and PW13 withdrew the monies and the cash was personally delivered to and received by the accused knowing fully well what they were for. The accused pocketed the company's fund for himself. PW8, PW11 and PW13, had no choice but to agree with the accused's special arrangement in order to protect the business interest of their respective companies. The manner in which the money was demanded and received, in our view, lend credence to the prosecution case that the accused has acted dishonestly, thus causing wrongful gain to himself and wrongful loss to THHE. Hence, we find no infirmity in the conviction on the remaining CBT charges. These convictions are safe.

[206] For completeness, we shall now touch very briefly on the argument raised by the learned counsel for the accused that the evidence of PW20 was self-serving and there were various contradictions in his testimony. However, it is worth repeating that the learned trial had critically evaluated the conduct and behaviour of PW20 as a whole and she found no reason to reject the testimony of PW20 as set out in her judgment. This is not a case of one man's word, PW20, against another's, the accused. PW20's evidence was supported by cogent independent evidence connecting the accused with the charges. Hence, it is reasonably safe for the learned trial judge to act upon PW20 evidence. We therefore find no reason to interfere with her findings.

[207] On the issue of contradictions and discrepancies of witnesses' evidence we can do no better than to quote the decision in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 at p 19, where the court held as follows:

> In this case different witnesses have testified to different parts of what had happened or what had been said and also there are, in the evidence of the witnesses for the prosecution, some discrepancies, as would be expected of witnesses giving their recollections of a series of events that took place in 1971–1973. In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[208] This is also in line with the Federal Court decision in the case of *Ong Teng For v Public Prosecutor* [2013] 1 CLJ 39 where Raus Sharif PCA (as he then was) delivering the judgment of the court held as follows:

> [33] It is settled law that the credibility of a particular witness and the weight to be given to his other evidence is manifestly within the province of a trial judge. In *Andy Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289, Shaik Daud JCA said that:
>
> > There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was in a better person to decide and an appellate court ought not to interfere with such findings.

[209] We, an appellate court do not have the advantage of observing the demeanor of witnesses and it is trite that an appellate court would be slow to disturb the findings of the subordinate court on the issue of credibility of

witnesses unless the findings made were perverse. Here, we do not find any finding of the trial judge or the High Court judge to be perverse. In this regard, we are reminded of the dicta in the case of *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101, where the court held:

> (7) the credibility of a witness is primarily a matter for the trial judge. The functions of an Appellate Court, when dealing with a question of fact in which questions of credibility are involved are limited in their character and scope and in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse not merely entertain doubts whether the decision below is right but be convinced that it is wrong. In this case the learned trial judge accepted the evidence of Atun, the prosecution witness, whom he found to be a consistent witness unshaken by very severe cross-examination and the Appeal Court could find no reason to interfere with his assessment.

[210] Reference may also be made to the observation of Wan Yahya J (as His Lordship then was) in *Pie Bin Chin v Public Prosecutor* [1985] 1 MLJ 234:

> Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly tooth combed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness' entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.
>
> Forgetfulness and failure to recall exactly certain events, which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief. Various persons are endowed with varying powers of cognition, attentiveness and perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly differing versions.
>
> I agree with the learned President's findings on this not only because he, having seen and heard the witness is in a better position than I am to evaluate the credibility of the witnesses, but also because I accept that no witness of truth can account for the details of events which had transpired some months previously with precision.

THE DEFENCE AGAINST THE CHARGES FOR MONEY LAUNDERING (CHARGES NO 2 AND NO 4)

[211] We will now touch on the defence raised by the accused in respect of the money laundering charges AMLATFA No 2 and No 4. Accused denied receiving the sum of RM570,000 and RM600,000 from PW8.

[212] In the grounds of judgment, the learned trial judge had in paras 104 and 106 at pp 110–111 appeal record encl 13 Vol 2, made the following findings:

> [104] Bagi pertuduhan 2 dan 4 AMLATFA, pembelaan OKT adalah merupakan

penafian semata-mata disamping mendakwa bahawa keterangan SP8 adalah keterangan palsu dan pengeluaran wang RM400,000, RM570,000 dan RM600,000 oleh SP8 digunakan untuk membiayai kos gaya hidup mewah keluarga SP8 dan membayar Jabatan lnsolvensi untuk melepaskan SP8 dari status muflis. Mahkamah memutuskan bahawa dakwaan pihak pembelaan terhadap SP8 adalah tidak berasas sama sekali. Tiada bukti bahawa SP8 memberi keterangan palsu dan menggunakan wang tersebut bagi tujuan seperti dikatakan oleh pihak pembelaan. Walaupun SP8 sememangnya seorang yang muflis, beliau hanya dilepaskan dari status muflis pada tahun 2015 sedangkan kejadian berlaku pada tahun 2013.

[106] Walaupun hasil siasatan SP23 ke atas akaun OKT tidak menunjukkan apa-apa kemasukan wang yang mencurigakan dan/atau sebarang transaksi yang boleh dikaitkan dengan pertuduhan-pertuduhan AMLATFA, ia tidak bermakna bahawa OKT tidak menerima wang tersebut. Apa yang penting pihak pendakwaan telah berjaya membuktikan penerimaan wang oleh OKT. Apa berlaku kepada wang tersebut setelah diterima oleh OKT adalah tidak material. Begitu juga dengan pemulangan harta yang disita kepada OKT tidak menunjukkan bahawa OKT tidak menerima wang tersebut.

CONCLUSION

[213] Having considered these findings and the rationale of the learned trial judge in doing so, we find no reasons whatsoever to disturb the factual findings made by the learned judge under the circumstances presented in this case.

[214] Now, in conclusion, we find that the learned trial judge has not misdirected herself in law. She had considered the evidence of both the prosecution and for the defence very carefully and had given her reasons why she accepted or did not accepted certain evidence and had correctly come to the conclusion that she did. She had the advantage of seeing and hearing the witnesses. We see no reasons why we should interfere with her finding of facts or her final decision. Undoubtedly, the same goes to the judgment delivered by the learned High Court judge where he had taken a detailed evaluation of the entire evidence, critically analysed witnesses evidence placed before the court with great care and at great length and made his findings. We do not find any infirmities in the decision of the learned High Court judge.

[215] For the reasons that we have given, we unanimously find that the conviction against the accused by the High Court for CBT Charges No 1, 2 and 4 and the AMLATFA Charges No 2 and No 4 are safe and we accordingly dismissed the appeal and affirmed the conviction and sentence of the High Court.

Order accordingly.

Reported by Ahmad Ismail